



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



HARVARD LAW LIBRARY

Received JUN 28 1921







DIGEST ANNOTATIONS

By special request of the Judges, an effort has been made to give, in each syllabus and index paragraph, a reference by number to the analogous topic and section of the new 1919 Washington State Digest.

REPORTER

WASHINGTON REPORTS

VOL. 111

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON.

APRIL 7, 1920 - JULY 26, 1920

ARTHUR REMINGTON

REPORTER

**SEATTLE AND SAN FRANCISCO
BANCROFT-WHITNEY COMPANY**

1921

OFFICIAL REPORT

Published Pursuant to Laws of Washington, 1905, page 330

Under the personal supervision of the Reporter

JUN 28 1921

**PRINTED, ELECTROTYPED AND BOUND
BY
FRANK M. LAMBORN, PUBLIC PRINTER**

JUDGES
OF THE
SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED BY THIS VOLUME

HON. O. R. HOLCOMB, CHIEF JUSTICE

DEPARTMENT ONE

HON. EMMETT N. PARKER

HON. JOHN F. MAIN

HON. KENNETH MACKINTOSH

HON. JOHN R. MITCHELL

DEPARTMENT TWO

HON. MARK A. FULLERTON

HON. WALLACE MOUNT

HON. WARREN W. TOLMAN

HON. J. B. BRIDGES

HON. L. L. THOMPSON, ATTORNEY GENERAL
C. S. REINHART, CLERK

JUDGES OF THE SUPERIOR COURTS

| | | |
|-----------------------------|-------------------|---------------------------------|
| HON. JOHN TRUAX..... | Ritzville.. | Adams, Benton and Franklin |
| HON. CHESTER F. MILLER..... | Dayton.. | Asotin, Columbia and Garfield |
| HON. WM. GRIMSHAW..... | Wenatchee | Chelan |
| HON. JOHN M. RALSTON..... | Port Townsend.. | Clallam and Jefferson |
| HON. R. H. BACK..... | Vancouver | Clarke |
| HON. WM. T. DARCH..... | Goldendale..... | Cowlitz, Klickitat and Skamania |
| HON. SAM B. HILL..... | Waterville..... | Douglas and Grant |
| HON. C. H. NEAL..... | Okanogan..... | Ferry and Okanogan |
| HON. GEO. D. ABEL { | Montesano..... | Grays Harbor |
| HON. BEN SHEEKS { | | |
| HON. RALPH C. BELL { | Everett..... | Island and Snohomish |
| HON. GUY C. ALSTON { | | |
| HON. BOYD J. TALLMAN { | | |
| HON. A. W. FRATER { | | |
| HON. MITCHELL GILLIAM { | | |
| HON. EVERETT SMITH { | | |
| HON. J. T. RONALD { | Seattle | King |
| HON. KING DYKEMAN { | | |
| HON. JOHN S. JUBEY { | | |
| HON. CALVIN S. HALL { | | |
| HON. CLAY ALLEN { | | |
| HON. WALTER M. FRENCH..... | Port Orchard..... | Kitsap |
| HON. JOHN B. DAVIDSON..... | Ellensburg | Kittitas |
| HON. W. A. REYNOLDS..... | Chehalis | Lewis |
| HON. JOSEPH SESSIONS..... | Davenport | Lincoln |
| HON. JOHN M. WILSON { | Olympia..... | Mason and Thurston |
| HON. D. F. WRIGHT { | | |
| HON. H. W. B. HEWEN..... | South Bend.... | Pacific and Wahkiakum |
| HON. DANIEL H. CAREY..... | Colville..... | Pend Oreille and Stevens |
| HON. W. O. CHAPMAN { | | |
| HON. M. L. CLIFFORD { | Tacoma | Pierce |
| HON. E. M. CARD { | | |
| HON. JOHN D. FLETCHER { | | |
| HON. W. H. PEMBERTON { | Bellingham.... | San Juan and Whatcom |
| HON. ED. E. HARDIN { | | |
| HON. AUGUSTUS BRAWLEY..... | Mt. Vernon..... | Skagit |
| HON. WM. A. HUNEKE { | | |
| HON. BRUCE BLAKE { | | |
| HON. DAVID W. HURN { | Spokane | Spokane |
| HON. HUGO E. OSWALD { | | |
| HON. R. M. WEBSTER { | | |
| HON. EDWARD C. MILLS..... | Walla Walla..... | Walla Walla |
| HON. R. L. McCROSKEY..... | Colfax | Whitman |
| HON. GEO. B. HOLDEN { | | |
| HON. H. M. TAYLOR { | Yakima | Yakima |

TABLE

OF

CASES REPORTED

| | <i>Page</i> |
|--|-------------|
| Aetna Accident & Liability Company, Lewis | |
| County v..... | 333 |
| Alaska Junk Company, Kahan v..... | 39 |
| American Savings Bank & Trust Company, | |
| Moore v..... | 148 |
| American State Bank v. Butts..... | 612 |
| Americus, Lovejoy v..... | 571 |
| Ames v. Duff and Youk..... | 259 |
| Arlington Dock Company, Pearson v..... | 14 |
| Barnes v. Bickle..... | 133 |
| Bartsch, Beyerle v..... | 287 |
| Bateman, Martin v..... | 634 |
| Bayer's Estate, In re..... | 276 |
| Bebb v. Jordan..... | 73 |
| Bennington County Savings Bank v. France | 483 |
| Benson, State ex rel. Sherman v..... | 124 |
| Berg, State v..... | 422 |
| Beyerle v. Bartsch..... | 287 |
| Bickle, Barnes v..... | 133 |
| Big Four Land Company v. Daracunas..... | 224 |
| Boost v. Capen..... | 227 |
| Bradner Company Incorporated, Di-Luck v..... | 291 |
| Brotherhood of American Yeomen, Teed v..... | 367 |
| Brown v. Hunt & Mottet Company | 564 |
| Brown, State v..... | 696 |
| Building Investment Company, Haggerty v..... | 638 |
| Bulger v. Yamaoka..... | 646 |
| Burgess, State v..... | 537 |
| Burley v. Hurley-Mason Company..... | 415 |

| | <i>Page</i> |
|--|-------------|
| Burnham v. Rowley..... | 656 |
| Burns v. Stolze..... | 392 |
| Burrows, Payne v..... | 329 |
| Bush & Lane Piano Company, Tibbetts v..... | 165 |
| Butts, American State Bank v..... | 612 |
| Calhoun Denny & Ewing, Lasman v..... | 467 |
| Capen, Boost v..... | 227 |
| Carman Distributing Company v. Cascade Laundry Company..... | 487 |
| Cartwright v. Hamilton..... | 685 |
| Cascade Laundry Company, Carman Distributing Company v. | 487 |
| Casey v. Williams..... | 348 |
| Chislett v. Seattle..... | 491 |
| Chittenden, State v..... | 213 |
| Clark Lloyd Lumber Company v. Puget Sound & Cascade Railway Company..... | 232 |
| Clark, Olson v..... | 691 |
| Clausen, State ex rel. Bagley v..... | 254 |
| Clausen, State ex rel. Younger v..... | 241 |
| Coons v. Olympia Light & Power Company..... | 677 |
| Cronkhite v. Whalen..... | 31 |
| Cuddy v. Sturtevant..... | 304 |
| Daracunas, Big Four Land Company v..... | 224 |
| Davidson, Pioneer Mining & Ditch Company v.... | 262 |
| Day v. St. Paul Fire & Marine Insurance Company | 49 |
| Di Luck v. Bradner Company, Incorporated..... | 291 |
| Duff and Youk, Ames v..... | 259 |
| Elliott, Jones v..... | 138 |
| Everett Packing Company, Florence Fish Company v..... | 1 |
| Fall, McElrath v..... | 438 |
| Fick's Estate, In re..... | 318 |

| | <i>Page</i> |
|--|-------------|
| Florence Fish Company v. Everett Packing Com- pany | 1 |
| France, Bennington County Savings Bank v. | 483 |
| Garford Motor Truck Company, Noel v. | 650 |
| George v. Pierce County. | 495 |
| Gottstein, State v. | 600 |
| Great Northern Railway Company, Skagit Mill Company v. | 378 |
| Greenwood v. Puget Mill Company. | 464 |
| Haggerty v. Building Investment Company. | 638 |
| Hainsworth, Hardinger v. | 590 |
| Hamilton, Cartwright v. | 685 |
| Hardinger v. Hainsworth. | 590 |
| Hayes, McVeety v. | 457 |
| Heal, Rawlings v. | 218 |
| Hebden v. Hebden. | 699 |
| Henrickson v. Smith. | 82 |
| Hoffman, Schmelling v. | 408 |
| Holly-Mason Hardware Company v. Schnatterly.. | 29 |
| Horner v. Pierce County. | 386 |
| Hover, Nordstrom v. | 176 |
| Hunt & Mottet Company, Brown v. | 564 |
| Hunter v. Radford. | 668 |
| Hurley-Mason Company, Burley v. | 415 |
| Hurley-Mason Company v. Pacific Commissary Company | 439 |
| Inglis v. Morton. | 373 |
| In re Bayer's Estate. | 276 |
| In re Fick's Estate. | 318 |
| In re Tukwila School District. | 329 |
| In re Wilson's Estate. | 491 |
| John R. O'Reilly, Incorporated v. Tillman. | 594 |
| Jones v. Elliott. | 138 |
| Jordan, Bebb v. | 73 |

| | <i>Page</i> |
|---|-------------|
| Kahan v. Alaska Junk Company..... | 39 |
| Katsuno, Noyes v..... | 529 |
| Kelly v. Merritt..... | 426 |
| Kildall, Moore v..... | 504 |
| King v. Title Trust Company..... | 508 |
| Kitsap County, Rust v..... | 170 |
| Kitt, Minnick v..... | 433 |
| Knecht v. Sims..... | 419 |
| Knopes, Zinn v..... | 606 |
| Kriegler v. Spokane Merchants' Association..... | 179 |
| Lasman v. Calhoun, Denny & Ewing..... | 467 |
| Lewis County v. Aetna Accident & Liability Com- pany | 333 |
| Loewe, Osner & Mehlhorn Incorporated v..... | 550 |
| Lovejoy v. Americus..... | 571 |
| Lucopoulos v. Sotriopoulos..... | 400 |
| McElrath v. Fall..... | 438 |
| McLaren v. Narrows Land Company..... | 402 |
| McVeety v. Hayes..... | 457 |
| Machinery Warehouse & Sales Company, Vick- ers v. | 576 |
| Martin v. Bateman..... | 634 |
| Merritt, Kelly v..... | 426 |
| Miller v. Schober..... | 631 |
| Minnick v. Kitt..... | 433 |
| Moore v. American Savings Bank & Trust Com- pany | 148 |
| Moore v. Kildall..... | 504 |
| Morton, Inglis v..... | 373 |
| Narrows Land Company, McLaren v..... | 402 |
| Noel v. Garford Motor Truck Company..... | 650 |
| Nordstrom v. Hover..... | 176 |
| Northern Bank & Trust Company, Zimmerli v.... | 624 |
| Noyes v. Katsuno..... | 529 |
| Nudd v. Rowe..... | 322 |

| | <i>Page</i> |
|---|-------------|
| Olsen v. Peerless Laundry..... | 660 |
| Olson v. Clark..... | 691 |
| Olympia Light & Power Company, Coons v..... | 677 |
| O'Reilly, John R., Incorporated v. Tillman..... | 594 |
| Osner & Mehlhorn, Incorporated v. Loewe..... | 550 |
| Pacific Commissary Company, Hurley-Mason Company v..... | 439 |
| Payne v. Burrows..... | 329 |
| Pearson v. Arlington Dock Company..... | 14 |
| Peerless Laundry, Olsen v..... | 660 |
| Pesha v. Pratt..... | 382 |
| Pierce County, George v..... | 495 |
| Pierce County, Horner v..... | 386 |
| Pioneer Mining & Ditch Company v. Davidson... | 262 |
| Powers, Shelton v..... | 320 |
| Pratt, Pesha v..... | 382 |
| Pratt v. Seattle..... | 104 |
| Public Service Commission, State ex rel. Allen v.. | 294 |
| Puget Mill Company, Greenwood v..... | 464 |
| Puget Sound & Cascade Railway Company, Clark Lloyd Lumber Company v..... | 232 |
| Radford, Hunter v..... | 668 |
| Rand, Wonderful Group Mining Company v..... | 557 |
| Rawlings v. Heal..... | 218 |
| Reynolds, State ex rel. Sheehan v..... | 281 |
| Robertson v. Shelton..... | 302 |
| Rousseau, State v..... | 533 |
| Rowe, Nudd v..... | 322 |
| Rowley, Burnham v..... | 656 |
| Rust v. Kitsap County..... | 170 |
| St. Paul Fire & Marine Insurance Company, Day v. | 49 |
| Schmelling v. Hoffman..... | 408 |
| Schnatterly, Holly-Mason Hardware Company v. | 29 |
| Schober, Miller v..... | 631 |

| | <i>Page</i> |
|---|-------------|
| Schultz v. Western Farm Tractor Company..... | 351 |
| Schwarzmilller v. Schwarzmilller..... | 672 |
| Seattle, Chislett v..... | 491 |
| Seattle, Pratt v..... | 104 |
| Seattle, State ex rel. LaGrave v..... | 340 |
| Security Savings Society v. Spokane County..... | 35 |
| Shelton v. Powers..... | 302 |
| Shelton, Robertson v..... | 302 |
| Sims, Knecht v..... | 419 |
| Skagit Mill Company v. Great Northern Railway Company | 378 |
| Skinner, State v..... | 435 |
| Slasor v. Slasor..... | 90 |
| Sloan Shipyards Corporation v. Thurston County | 361 |
| Smith, Henrickson v..... | 82 |
| Sotriopoulos, Lucopoulos v..... | 400 |
| Spokane County, Security Savings Society v..... | 35 |
| Spokane Merchants' Association, Kriegler v..... | 179 |
| State v. Berg | 422 |
| State v. Brown | 696 |
| State v. Burgess | 537 |
| State v. Chittenden | 213 |
| State v. Gottstein | 600 |
| State v. Rousseau | 533 |
| State v. Skinner | 435 |
| State v. Superior Court, Adams County..... | 542 |
| State v. Suttle | 696 |
| State v. Terrien | 345 |
| State v. Thompson | 525 |
| State ex rel. Allen v. Public Service Commission.. | 294 |
| State ex rel. Bagley v. Clausen..... | 254 |
| State ex rel. Bouffleur v. Superior Court, Pierce County | 477 |
| State ex rel. Godfrey v. Superior Court, Pierce County | 101 |
| State ex rel. Gunn v. Superior Court, King County | 187 |

| | <i>Page</i> |
|---|---------------|
| State ex rel. LaGrave v. Seattle..... | 340 |
| State ex rel. Lincoln v. Superior Court, Okanogan County | 615 |
| State ex rel. Rothwell & Company, Incorporated v. Superior Court, King County..... | 63 |
| State ex rel. Sheehan v. Reynolds..... | 281 |
| State ex rel. Sherman v. Benson..... | 124 |
| State ex rel. Stephens v. Superior Court, Sno- homish County | 205 |
| State ex rel. Younger v. Clausen..... | 241 |
| Stolze, Burns v..... | 392 |
| Stolze v. Stolze..... | 398, 697, 699 |
| Sturtevant, Cuddy v..... | 302 |
| Superior Court, State v..... | 542 |
| Superior Court, State ex rel. Bouffleur v..... | 477 |
| Superior Court, State ex rel. Godfrey v..... | 101 |
| Superior Court, State ex rel. Gunn v..... | 187 |
| Superior Court, State ex rel. Lincoln v..... | 615 |
| Superior Court, State ex rel. Rothwell & Company Incorporated v..... | 63 |
| Superior Court, State ex rel. Stephens v..... | 205 |
| Suttle, State v..... | 696 |
| Teed v. Brotherhood of American Yeomen..... | 367 |
| Terrien, State v..... | 345 |
| Thompson, State v..... | 525 |
| Thurston County, Sloan Shipyards Corporation v. | 361 |
| Tibbetts v. Bush & Lane Piano Company..... | 165 |
| Tillman, John R. O'Reilly Incorporated v..... | 594 |
| Title Trust Company, King v..... | 508 |
| Tukwila School District, In re..... | 320 |
| Vickers v. Machinery Warehouse & Sales Com- pany | 576 |
| Western Farm Tractor Company, Schultz v..... | 351 |
| Whalen, Cronkhite v..... | 31 |

| | <i>Page</i> |
|---|-------------|
| White v. White..... | 354 |
| Williams, Casey v..... | 348 |
| Wilson's Estate, In re..... | 491 |
| Wonderful Group Mining Company v. Rand..... | 557 |
| Yamaoka, Bulger v..... | 646 |
| Zimmerli v. Northern Bank & Trust Company.... | 624 |
| Zinn v. Knopes..... | 606 |

TABLE

OF

CASES CITED BY THE COURT

| | <i>Page</i> |
|--|-----------------------------------|
| Adair v. McNeill..... | 95 Wash. 160..... 666 |
| Allis-Chalmers Mfg. Co. v. Ellens- burg | 108 Wash. 533..... 514, 518 |
| American Fuel Co. v. Benton..... | 98 Wash. 26..... 346 |
| American Sav. Bank & Trust Co. v. Dennis | 90 Wash. 547..... 586, 587 |
| American Steel etc. Co. v. Bilster.... | 200 Ill. App. 175..... 614 |
| American Trust & Sav. Bank v. Gueder Mfg. Co..... | 150 Ill. 336..... 586 |
| Anderson v. Mitchell..... | 51 Wash. 265..... 506 |
| Andrews v. Lembeck..... | 46 Ohio St. 38..... 192 |
| Anthony v. New York etc. R..... | 162 Mass. 60..... 614 |
| Arding v. Flower..... | 8 Term. Rep. (K. B.) 534.. 192 |
| Argo Mfg. Co. v. Porter..... | 52 Wash. 100..... 560 |
| Arnold v. Waltz..... | 53 Iowa 706..... 481 |
| Arthur v. Washington Water Power Co. | 42 Wash. 431..... 466 |
| Askey v. New York Life Ins. Co.... | 102 Wash. 27..... 62 |
| Atchison v. Morris | 11 Fed. 582..... 192 |
| Atherton v. Tacoma etc. Co..... | 30 Wash. 395..... 684 |
| Ayres v. Farmers' & Merchants' Bank | 79 Mo. 421..... 585 |
| Baisley v. Baisley..... | 133 Mo. 544..... 193 |
| Baldwin v. Emerson..... | 16 R. I. 304..... 193, 200 |
| Ballard v. Alaska Theatre Co..... | 93 Wash. 655..... 185 |
| Ballard v. Way..... | 34 Wash. 116..... 396 |
| Ballinger v. Elliott..... | 72 N. C. 594..... 193 |
| Bank of California v. Starrett..... | 110 Wash. 231..... 506 |
| Bardshar v. Seattle Elec. Co..... | 72 Wash. 200..... 681 |
| Barto v. Nix..... | 15 Wash. 563..... 450 |
| Barton v. Cox..... | 176 S. W. (Tex. C. A.) 793... 470 |
| Bassett v. Fairchild..... | 132 Cal. 637..... 560 |
| Bauer v. Widholm..... | 49 Wash. 310..... 397 |
| Bayer's Estate, In re..... | 101 Wash. 694..... 276 |
| Beard v. Independent District of Pella City | 88 Fed. 375..... 627 |

| | | | <i>Page</i> |
|--|-----|--------------------------|-------------|
| Bergeron, In re..... | 220 | Mass. 472..... | 298 |
| Bernard v. Benson..... | 58 | Wash. 191..... | 643 |
| Bernot v. Morrison..... | 81 | Wash. 538..... | 450 |
| Berwind-White Coal Min. Co. v. Metropolitan S. S. Co..... | 166 | Fed. 782..... | 569 |
| Beverly v. Davis..... | 79 | Wash. 537..... | 599 |
| Bishop v. Vose..... | 27 | Conn. 1..... | 193 |
| Blight v. Fisher..... | | Fed. Cas. No. 1,542..... | 198 |
| Blom v. Blom Codfish Co..... | 71 | Wash. 41..... | 560 |
| Bloomer v. Todd..... | 3 | Wash. Terr. 599..... | 299 |
| Blum v. Smith..... | 66 | Wash. 192..... | 430 |
| Board of Com'rs of Creek County v. Bruce | 51 | Okl. 541..... | 252 |
| Boeringa v. Perry..... | 96 | Wash. 57..... | 514, 518 |
| Bolz v. Crone..... | 64 | Kan. 570..... | 192 |
| Bonneviere v. Cole..... | 90 | Wash. 526..... | 643 |
| Boothe v. Summit Coal Min. Co.... | 55 | Wash. 167..... | 563 |
| Borg v. Bringham..... | 105 | Wash. 521..... | 377 |
| Bowden v. Walla Walla etc. R. Co.. | 79 | Wash. 184..... | 681 |
| Bowman v. Domestic & Foreign M. S. etc. | 87 | N. Y. Supp. 621..... | 493 |
| Bowman v. Harrison..... | 59 | Wash. 56..... | 207 |
| Boylan v. Bock..... | 60 | Wash. 423..... | 399 |
| Boyle v. Narrows Land Co..... | 70 | Wash. 59..... | 407 |
| Bridges v. Sheldon..... | 7 | Fed. 17..... | 192 |
| Brigham v. Mutual Life Ins. Co.... | 95 | Wash. 196..... | 60 |
| Brooks v. Bigelow..... | 142 | Mass. 6..... | 585 |
| Brooks v. Farwell..... | 4 | Fed. 166..... | 191 |
| Brooks v. State ex rel. Richards... | 3 | Boyce (Del.) 1..... | 192, 199 |
| Brown v. Baruch..... | 24 | Wash. 572..... | 598 |
| Brown v. Getchell..... | 11 | Mass. 11..... | 192 |
| Brown v. Massey..... | 92 | Pac. (Okl.) 246..... | 412 |
| Bruenn v. North Yakima School Dist. No. 7..... | 101 | Wash. 374..... | 389 |
| Building Com. of Detroit v. Kunin.. | 181 | Mich. 604..... | 77 |
| Burger v. Roelsch..... | 28 | N. Y. Supp. 460..... | 79 |
| Burke v. Bladine..... | 99 | Wash. 383..... | 486 |
| Burnley v. Shinn..... | 80 | Wash. 240..... | 655 |
| Burns v. Commencement Bay Land Co. | 4 | Wash. 558..... | 560 |
| Burns v. Stolze..... | 111 | Wash. 392..... | 698 |
| Burton v. United States..... | 196 | U. S. 283..... | 583, 584 |
| Cain v. Commercial Pub. Co..... | 232 | U. S. 124..... | 192 |
| Caldwell v. Hurley..... | 41 | Wash. 296..... | 270 |
| Caldwell v. Northern Pac. R. Co.... | 62 | Wash. 420..... | 236 |

CASES CITED.

xv

| | | | <i>Page</i> |
|---|-----|-----------------------|-------------|
| California Sav. Bank v. Kennedy.. | 167 | U. S. 362..... | 581 |
| Cameron v. Roberts..... | 87 | Wis. 291..... | 192 |
| Campbell v. Roddy..... | 44 | N. J. Eq. 244..... | 519 |
| Carlisle Packing Co. v. Deming.... | 62 | Wash. 455..... | 18 |
| Carlson v. Kies..... | 75 | Wash. 171..... | 628 |
| Case Mfg. Co. v. Garven..... | 45 | Ohio 289..... | 521 |
| Casey v. Oakes..... | 17 | Wash. 409..... | 412 |
| Catton v. Reehling..... | 78 | Wash. 187..... | 221 |
| Cawsey v. Brickey..... | 82 | Wash. 653..... | 527 |
| Central Mercantile Co. v. Oklahoma State Bank | 83 | Kan. 504..... | 589 |
| Central Trust Co. v. Texas etc. R. Co. | 23 | Fed. 673..... | 567 |
| Chase v. Seattle Taxicab & T. Co.. | 78 | Wash. 537..... | 666 |
| Chase v. Tacoma Box Co..... | 11 | Wash. 377..... | 514 |
| Cherry v. Arthur..... | 5 | Wash. 787..... | 514 |
| Christensen v. Koch..... | 85 | Wash. 472..... | 430 |
| City of New York v. Baird..... | 117 | N. Y. Supp. 561..... | 337 |
| Clark Lloyd Lumber Co. v. Puget Sound & C. R. Co..... | 92 | Wash. 601..... | 234, 240 |
| Clark Lloyd Lumber Co. v. Puget Sound & C. R. Co..... | 96 | Wash. 313..... | 234 |
| Clemmons v. Elder..... | 9 | Iowa 272..... | 644 |
| Cleveland C. C. & St. L. R. Co. v. Berry | 152 | Ind. 607..... | 28 |
| Coman v. Peters..... | 52 | Wash. 574..... | 169 |
| Commercial Bank of Albany v. Hughes | 17 | Wend. (N. Y.) 94..... | 584 |
| Commonwealth Roofing Co. v. North American T. Co..... | 135 | Fed. 984..... | 568 |
| Consolidated Ice Machine Co. v. Kelfer | 134 | Ill. 481..... | 19 |
| Cooley v. Golden..... | 117 | Mo. 33..... | 500 |
| Cooper v. Wyman..... | 122 | N. C. 784..... | 192 |
| Cope v. District Fair Ass'n..... | 199 | Ill. 489..... | 45 |
| Corcoran v. Postal Tel-Cable Co.... | 80 | Wash. 570..... | 136 |
| County of Clay v. Society for Sav- ings | 104 | U. S. 579..... | 313 |
| Crane v. Specht..... | 39 | Neb. 123..... | 271 |
| Creditors Claim & A. Co. v. North- west L. & Tr. Co..... | 81 | Wash. 247..... | 162 |
| Crumlish's Adm'r v. Central Imp. Co. | 38 | W. Va. 390..... | 560 |
| D'Almeida v. Boston & Maine R.... | 209 | Mass. 81..... | 28 |

| | | | <i>Page</i> |
|---|-----|-------------------|-----------------------|
| Davenport v. National Bank of Commerce | 112 | N. Y. Supp. 291.. | 159, 161, 163, 164 |
| Denee v. Morrison | 95 | Wash. 76..... | 503 |
| Devitt v. Puget Sound T., L. & P. Co. | 106 | Wash. 449..... | 681 |
| Dickinson Fire etc. Brick Co. v. Crowe & Co. | 63 | Wash. 550..... | 654 |
| Dimuria v. Seattle Transfer Co. | 50 | Wash. 633..... | 663 |
| Dodge v. Boston & P. R. Co. | 154 | Mass. 299..... | 481 |
| Dorman v. Plowman | 41 | Wash. 477..... | 609 |
| Dungan v. Miller | 37 | N. J. L. 182..... | 192 |
| Dunsmuir v. Port Angeles Gas etc. Co. | 24 | Wash. 104..... | 643 |
| Ekre v. Cain | 66 | Wash. 659..... | 592 |
| Electric Appliance Co. v. United States Fld. & Guar. Co. | 110 | Wis. 434..... | 337 |
| Ellis v. Bardin | 36 | Wash. 122..... | 347 |
| Ellis v. Degarmo | 17 | R. I. 715..... | 193 |
| Ellis v. Ward | 137 | Ill. 509..... | 560 |
| Elmendorf v. Golden | 37 | Wash. 664..... | 663 |
| Empire Hotel Co. v. Main | 98 | Ga. 176..... | 45 |
| Empire State Surety Co. v. Carroll County | 194 | Fed. 593..... | 626 |
| Engstrom v. Peterson | 107 | Wash. 523..... | 289 |
| Equitable Bldg. & Loan Ass'n v. King | 48 | Fla. 252..... | 644 |
| Eriksen v. Manufacturers' Dist. Co. | 103 | Wash. 159..... | 610 |
| Eubank v. Richmond | 110 | Va. 749..... | 77 |
| Everett v. Adamson | 106 | Wash. 355..... | 37 |
| Eyers v. Burbank Co. | 97 | Wash. 220..... | 145, 431 |
| Federal Iron & B. B. Co. v. Hock ... | 42 | Wash. 668..... | 609 |
| Feess v. Mechanics' Bank | 84 | Kan. 828..... | 45 |
| Felsinger v. Quinn | 62 | Wash. 183..... | 395 |
| Filley v. Christopher | 39 | Wash. 22..... | 514 |
| Fink v. Marr | 81 | Wash. 92..... | 654 |
| Finn v. Finn | 106 | Wash. 137..... | 221 |
| First National Bank v. Ames | 39 | Minn. 179..... | 192 |
| First National Bank v. Armstrong. ... | 39 | Fed. 231..... | 585 |
| First National Bank of Fon du Lac v. Hunt | 40 | Wash. 190..... | 466 |
| Fisk v. Westover | 4 | S. D. 233..... | 193 |
| Fogarty v. Northern Pac. R. Co. | 85 | Wash. 90..... | 236 |
| Fourth National Bank v. Mayer ... | 89 | Ga. 108..... | 589 |
| Friedman v. Manley | 21 | Wash. 675..... | 485 |

CASES CITED.

xvii

| | | | Page |
|--|-----|-----------------------|---------------|
| Garrett v. Sparks Brothers..... | 61 | Wash. 397..... | 469 |
| George v. Butler..... | 26 | Wash. 456..... | 168 |
| George v. Kurdy..... | 92 | Wash. 277..... | 145 |
| German Sav. & L. Society v. Weber | 16 | Wash. 95..... | 517, 523 |
| Gill v. Lydick..... | 40 | Neb. 508..... | 500 |
| Girard Trust Co. v. City of Phila- delphia | 248 | Pa. St. 179..... | 614 |
| Godfrey v. Camp..... | 95 | Wash. 674..... | 486 |
| Goertz v. Continental Life Ins. & Inv. Co. | 95 | Wash. 358..... | 61 |
| Goetz v. Bank of Kansas City..... | 119 | U. S. 551..... | 584 |
| Golden v. Cervenka..... | 278 | Ill. 409..... | 508 |
| Goose River Bank v. Willow Lake School Township | 1 | N. D. 26..... | 314 |
| Gould v. Gleason..... | 10 | Wash. 476..... | 598 |
| Gould v. White..... | 54 | Wash. 394..... | 397 |
| Grabfelder v. Yosburgh..... | 85 | N. Y. Supp. 633..... | 490 |
| Graffam v. Burgess..... | 117 | U. S. 180..... | 575 |
| Graves v. Columbia Underwriters.. | 93 | Wash. 196..... | 222 |
| Greenville v. Ormand..... | 51 | S. C. 121..... | 336 |
| Greer v. Young..... | 120 | Ill. 184..... | 193, 201, 203 |
| Grubb v. House..... | 93 | Wash. 200..... | 609 |
| Gunby v. Ingram..... | 57 | Wash. 97..... | 169 |
| Gunnison County Com'rs v. Rollins. | 173 | U. S. 255..... | 311, 314 |
| Guynn v. McDaniel..... | 4 | Idaho 605..... | 193 |
| Haefele v. Brackett..... | 95 | Wash. 625..... | 421 |
| Hale v. City Cab, C. & T. Co..... | 66 | Wash. 459..... | 207 |
| Hale v. Wharton..... | 73 | Fed. 739..... | 191 |
| Halsey v. State..... | 4 | N. J. L. 369..... | 192 |
| Harbican v. Chamberlin..... | 82 | Wash. 556..... | 303 |
| Hardin v. Shedd..... | 190 | U. S. 508..... | 500 |
| Hart v. City Theatres Co..... | 215 | N. Y. 322..... | 79 |
| Hartell v. T. H. Simonson & Son Co. | 218 | N. Y. 345..... | 25 |
| Hayes v. Shields..... | 2 | Yeates (Pa.) 221..... | 192 |
| Hayes v. Wagner..... | 220 | Ill. 256..... | 292 |
| Hazeltine v. Blake..... | 26 | Wash. 231..... | 175 |
| Healey, In re..... | 53 | Vt. 694..... | 192 |
| Hembree v. MacFarland..... | 55 | Wash. 605..... | 397 |
| Henegar v. Spangler..... | 29 | Ga. 217..... | 193 |
| Henneberg v. Cook..... | 103 | Wash. 685..... | 225 |
| Herrett v. Puget Sound T., L. & P. Co. | 103 | Wash. 101..... | 681 |
| Hester v. Commonwealth..... | 85 | Pa. St. 139..... | 604 |
| Hewitt-Lea Lumber Co. v. Chesley. | 68 | Wash. 53..... | 296 |

| | | | <i>Page</i> |
|--|-----|---------------|-------------------|
| Higgins v. Western Union Tel. Co. | 156 | N. Y. | 75..... 25 |
| Hill v. Newell..... | 86 | Wash. | 227..... 499, 501 |
| Hillis Logging Co. v. Mescher..... | 69 | Wash. | 454..... 470 |
| Hoffmeister v. Renton Co-op. Coal Co. | 40 | Wash. | 48..... 466 |
| Hogan v. Kyle..... | 7 | Wash. | 595..... 593 |
| Holly v. Munro..... | 55 | Wash. | 311..... 397 |
| Hoover v. Bouffleur..... | 74 | Wash. | 382..... 598 |
| Humphrey v. Mutual Life Ins. Co... | 86 | Wash. | 672..... 370, 371 |
| Hutchinson v. Mt. Vernon Water & P. Co. | 49 | Wash. | 469..... 450 |
| Jacobs v. Seattle..... | 100 | Wash. | 524..... 113 |
| Jenkins v. Gronen..... | 98 | Wash. | 128..... 342 |
| Johnson v. Johnson..... | 85 | Wash. | 18..... 664, 666 |
| Johnson v. Puget Mill Co..... | 28 | Wash. | 515..... 609 |
| Johnson v. Spear..... | 76 | Mich. | 139..... 27 |
| Jones v. Morrison..... | 31 | Minn. | 140..... 563 |
| Juneau Bank v. McSpedan..... | | Fed. Cas. No. | 7,852..... 191 |
| Katterhagen v. Meister..... | 75 | Wash. | 112..... 221 |
| Kaufman v. Garner..... | 173 | Fed. | 550..... 192 |
| Kelley v. People's etc. Bank..... | 181 | Ill. App. | 142..... 614 |
| Kenerson v. Henry..... | 101 | Mass. | 152..... 614 |
| Kennard v. Mabry..... | 78 | Tex. | 151..... 644 |
| Kennedy v. Supreme Tent of Knights of Maccabees..... | 100 | Wash. | 36..... 372 |
| Kent v. Williams..... | 146 | Cal. | 3..... 644 |
| Kllessig v. Allspaugh..... | 91 | Cal. | 231..... 336 |
| Kincaid v. Seattle..... | 74 | Wash. | 617..... 112 |
| Kingsley v. Standard Lumber Co... | 84 | Wash. | 189..... 417 |
| Kinnie v. Lant..... | 68 | Fed. | 436..... 191 |
| Kiser v. Suppe..... | 133 | Mo. App. | 19..... 28 |
| Kleeb v. Long-Bell Lumber Co..... | 27 | Wash. | 648..... 490 |
| Klock v. Newbury..... | 63 | Wash. | 153..... 655 |
| Knowlton v. Johnson..... | 37 | Mich. | 47..... 521 |
| Lancey v. King County..... | 15 | Wash. | 9..... 174 |
| Langford v. Murphey..... | 30 | Wash. | 499..... 466 |
| Lardned v. Griffin..... | 12 | Fed. | 590..... 192 |
| Lawrence v. Halverson..... | 41 | Wash. | 534..... 412 |
| Lawton Pressed B. & T. Co. v. Ross-Kellar T. P. B. M. Co..... | 38 | Okl. | 59..... 520 |
| Lewis v. Miller..... | 115 | Ky. | 623..... 193 |
| Lewis Leonhardt & Co. v. Small & Co. | 117 | Tenn. | 153..... 581, 584 |
| Lindblom v. Johnston..... | 92 | Wash. | 171..... 270, 271 |

CASES CITED. **xix**

xix

| | | | | Page |
|---|-----|----------------------|----------|---------------|
| Link Belt Mach. Co. v. Hughes..... | 174 | Ill. | 155..... | 569 |
| Linton v. Cooper..... | 54 | Neb. | 438..... | 192 |
| Lipscomb v. Kitrell..... | 11 | Hump. (30 Tenn.) | 256.. | 470 |
| Little-Wetsel Co. v. Lincoln..... | 101 | Wash. | 435..... | 617 |
| Livesey v. Brown..... | 35 | Neb. | 111..... | 644 |
| Livieratos v. Commonwealth Secur- ity Co. | 57 | Wash. | 376..... | 407 |
| Lloyd v. Calhoun..... | 78 | Wash. | 438..... | 532 |
| Long v. Hawken..... | 114 | Md. | 234..... | 192, 199 |
| Loveday v. Anderson..... | 18 | Wash. | 322..... | 450 |
| Lutkens v. Young..... | 63 | Wash. | 452..... | 395 |
| Lyell v. Goodwin..... | 4 | McLean (U.S.Cir.Ct.) | 29. | 192 |
| McAdam v. Benson Log. & Lum. Co. | 57 | Wash. | 407..... | 299 |
| McDougall v. Walling..... | 21 | Wash. | 478..... | 485 |
| McEvilla v. Puget Sound T., L. & P. Co. | 95 | Wash. | 657..... | 681 |
| McGlauffin v. Holman..... | 1 | Wash. | 239..... | 610 |
| McPhee v. Nida..... | 60 | Wash. | 619..... | 394, 675 |
| Magnuson v. MacAdam..... | 77 | Wash. | 289..... | 573 |
| Mallory v. Mallory Wheeler Co.... | 61 | Conn. | 131..... | 562 |
| Marble Co. v. Harvey..... | 92 | Tenn. | 115..... | 581 |
| Marine Coal Co. v. Pittsburgh etc. Co. | 246 | Pa. St. | 478..... | 614 |
| Marston v. Williams..... | 45 | Minn. | 116..... | 644 |
| Martin v. Bason..... | 76 | Ark. | 158..... | 192 |
| Martin v. New York etc. R. Co.... | 62 | Conn. | 331..... | 614 |
| Maryland Casualty Co. v. Hill.... | 100 | Wash. | 289..... | 338, 339 |
| Massey v. Colville..... | 45 | N. J. L. | 119..... | 192 |
| Matthews v. Tufts..... | 87 | N. Y. | 568..... | 192 |
| Matzger v. Arcade Bldg. etc. Co.... | 80 | Wash. | 401..... | 610 |
| Mayor etc. of Baltimore v. Carroll. | 128 | Md. | 68..... | 614 |
| Meade v. Fronch..... | 4 | Wash. | 11..... | 296 |
| Mechanical Appliance Co. v. Castle- man | 215 | U. S. | 437..... | 192 |
| Meeker v. Waddle..... | 83 | Wash. | 628..... | 485 |
| Mesterman v. Home Mut. Ins. Co.. | 5 | Wash. | 524..... | 52 |
| Metropolitan Nat. Bank v. Lloyd.. | 90 | N. Y. | 530..... | 584 |
| Miles v. McCullough..... | 1 | Bin. (Pa.) | 77..... | 192 |
| Miller v. Gerry..... | 81 | Wash. | 217..... | 145 |
| Minnich v. Packard..... | 42 | Ind. App. | 371..... | 193 |
| Mitchell v. Huron County Circuit Judge | 53 | Mich. | 541..... | 191, 192, 194 |
| Morgan v. Bell..... | 3 | Wash. | 554..... | 636 |
| Morris-Miller Co. v. Von Pressentin | 63 | Wash. | 74..... | 586 |
| Morrisey v. Schultz..... | 68 | Wash. | 237..... | 303 |
| Morrow v. Dudley..... | 144 | Fed. | 441..... | 192 |

| | | | <i>Page</i> |
|-------------------------------------|-----|---------------------------|---------------|
| Murphy's Estate, In re..... | 98 | Wash. 548..... | 358 |
| Murray v. Wilcox..... | 122 | Iowa 188..... | 192 |
| Musselman v. McElhenny..... | 23 | Ind. 4..... | 313 |
| Nave v. McGrane..... | 19 | Idaho 111..... | 79 |
| Nebraska v. Iowa..... | 143 | U. S. 186..... | 500 |
| Nelson v. Davis..... | 102 | Wash. 313..... | 608 |
| Newell v. Loeb..... | 77 | Wash. 182..... | 499, 501 |
| Newton v. Askew..... | 6 | Hare (Ch.) 319..... | 193 |
| Nichols v. Capen..... | 79 | Wash. 120..... | 303 |
| Nichols v. Horton..... | 14 | Fed. 327..... | 192 |
| Niemeyer v. Weyerhaeuser..... | 95 | Iowa 497..... | 28 |
| Noble v. Doughten..... | 72 | Kan. 336..... | 584, 585 |
| Nolan v. Arnot..... | 36 | Wash. 101..... | 396 |
| Nordgren v. Lawrence..... | 74 | Wash. 305..... | 136 |
| Norris v. Beach..... | 2 | Johns. (N.Y.) 294..... | 193 |
| Northlake Avenue, In re..... | 96 | Wash. 344..... | 614 |
| Northwestern etc. Bank v. Griffiths | 18 | Wash. 69..... | 346 |
| Northwestern Lumber Co. v. Aber- | | | |
| deen | 20 | Wash. 102..... | 119 |
| Northwestern Lumber Co. v. Aber- | | | |
| deen | 22 | Wash. 404..... | 119 |
| Nutter v. Cowley Inv. Co..... | 85 | Wash. 207..... | 228 |
| O'Brien v. East River Bridge Co.... | 161 | N. Y. 539..... | 163 |
| O'Brien v. Grant..... | 146 | N. Y. 163..... | 159, 163, 164 |
| O'Connor v. Enos..... | 56 | Wash. 448..... | 609 |
| O'Donnell v. McCool..... | 89 | Wash. 537..... | 450 |
| Ogden v. Peters..... | 15 | Barb. (N.Y.) 560..... | 604 |
| Old National Bank v. Gibson..... | 105 | Wash. 578..... | 587 |
| Olsen v. Veness..... | 105 | Wash. 599..... | 25, 693 |
| Olson v. Nebraska Tel. Co..... | 87 | Neb. 593..... | 20 |
| Olympia v. Mann..... | 1 | Wash. 389..... | 76 |
| Oppegaard v. Board of County | | | |
| Com'rs | 120 | Minn. 443..... | 481 |
| Palmer v. Rowan..... | 21 | Neb. 452..... | 192 |
| Parker v. Hotchkiss..... | | Fed. Cas. No. 10,739..... | 191, 198 |
| Parker v. Marco..... | 136 | N. Y. 585..... | 192 |
| Patterson v. Wenatchee Canning | | | |
| Co. | 53 | Wash. 155..... | 417 |
| Peet v. Fowler..... | 170 | Fed. 618..... | 192 |
| Pence v. Langdon..... | 99 | U. S. 578..... | 489 |
| People v. Doyell..... | 48 | Cal. 85..... | 604 |
| People ex rel. State Board of Char- | | | |
| ities v. New York Society etc.... | 162 | N. Y. 429..... | 494 |
| People's Inv. Co. v. Crawford..... | 45 | S. W. (Tex. C. A.) 738.. | 45 |

CASES CITED.

xxi

| | | | <i>Page</i> |
|--------------------------------------|-----|----------------------|-------------|
| Person v. Grier..... | 66 | N. Y. 124..... | 192 |
| Persse v. Persse..... | 5 | H. L. Cas. 671..... | 192 |
| Peters v. Van Horn..... | 37 | Wash. 550..... | 636 |
| Peterson v. Lara..... | 46 | Wash. 448..... | 396 |
| Peth v. Spear..... | 63 | Wash. 291..... | 492 |
| Philadelphia & Reading R. C. & I. | | | |
| Co. v. Barrie..... | 179 | Fed. 50..... | 25 |
| Pierson v. Northern Pac. R. Co..... | 61 | Wash. 450..... | 207 |
| Pico v. Cohn..... | 91 | Cal. 129..... | 486 |
| Platt v. Union Pac. R. R. Co..... | 99 | U. S. 48..... | 298 |
| Plummer v. Ilse..... | 41 | Wash. 5..... | 598 |
| Points v. Nier..... | 91 | Wash. 20..... | 358 |
| Port Townsend v. Lewis..... | 34 | Wash. 413..... | 663 |
| Potter v. Whatcom..... | 25 | Wash. 207..... | 119 |
| Pratt Consol. Coal Co. v. Morton... | 14 | Ala. App., 194..... | 614 |
| Prescott v. Puget Sound B. & D. Co. | 30 | Wash. 158..... | 346 |
| Presidio County v. Noel-Young B. & | | | |
| S. Co. | 212 | U. S. 58..... | 317 |
| Proctor v. State..... | 15 | Okl. Cr. 338..... | 540 |
| Progress Amusement Co. v. Baker.. | 106 | Wash. 64..... | 79 |
| Pullman v. Pullman..... | 92 | Wash. 120..... | 395 |
| Quient v. Quient..... | 105 | Wash. 315..... | 700 |
| Quinn v. Mutual Life Ins. Co..... | 91 | Wash. 543..... | 59, 60 |
| Quinn v. National Sugar R. Co..... | 92 | N. Y. Supp. 95..... | 25 |
| Ready v. McGillivray..... | 109 | Wash. 387..... | 303 |
| Redick v. Peterson..... | 99 | Wash. 368..... | 666 |
| Reed v. Parker..... | 33 | Wash. 107..... | 599, 600 |
| Rees v. McDaniel..... | 115 | Mo. 145..... | 500 |
| Rehmke v. Fogarty..... | 57 | Wash. 412..... | 466 |
| Reynolds v. Pacific Marine Ins. Co.. | 105 | Wash. 666..... | 53 |
| Rhode Island Mtg. & Tr. Co. v. Spo- | | | |
| kane | 19 | Wash. 616..... | 119 |
| Richards v. Redelsheimer..... | 36 | Wash. 325..... | 203 |
| Richardson v. Smith..... | 74 | N. J. L. 111..... | 192 |
| Ridgway Stove Co. v. Way..... | 141 | Mass. 557..... | 521 |
| Ridley v. Seaboard & R. R. Co..... | 124 | N. C. 37..... | 614 |
| Roberts v. Thompson..... | 134 | N. Y. Supp. 363..... | 192 |
| Robertson v. Freebury..... | 87 | Wash. 558..... | 485, 486 |
| Rogers v. Lippy..... | 99 | Wash. 312..... | 225, 608 |
| Rogers v. Trumbull..... | 32 | Wash. 211..... | 371 |
| Roschynialski v. Hale..... | 201 | Fed. 1017..... | 192 |
| Rothchild Brothers v. Mahoney.... | 51 | Wash. 633..... | 207 |
| Rowe v. Silbaugh..... | 107 | Wash. 518..... | 486 |
| Rugger v. Hammond..... | 95 | Wash. 85..... | 269 |

| | | | | <i>Page</i> |
|--------------------------------------|-----|----------------|----------|-------------|
| Ruggles v. Williams..... | 38 | Tenn. (1 Head) | 80..... | 644 |
| Russell v. Allen..... | 107 | U. S. | 163..... | 494 |
| St. John's Military Academy v. Ed- | | | | |
| wards | 143 | Wis. | 551..... | 299 |
| St. Louis F. S. etc. v. Tiernan..... | 37 | Kan. | 606..... | 560 |
| San Antonio & A. P. R. Co. v. | | | | |
| Bowles | 88 | Tex. | 634..... | 20 |
| Sanford v. Chase..... | 3 | Cow. (N. Y.) | 381..... | 193 |
| San Marcos Electric L. & P. Co. v. | | | | |
| Compton | 48 | Tex. Civ. App. | 586..... | 20 |
| Savannah A. & M. R. v. Buford..... | 106 | Ala. | 303..... | 614 |
| Schmidt v. City of Defiance..... | 117 | Fed. | 702..... | 313 |
| Schroeder v. Hotel Commercial Co.. | 84 | Wash. | 685..... | 654 |
| Schulte v. Schering | 2 | Wash. | 127..... | 610 |
| Scott v. McIntyre Co..... | 93 | Kan. | 508..... | 584, 585 |
| Seattle v. Hinckley | 40 | Wash. | 468..... | 77 |
| Seattle & Montana R. Co. v. Roeder | 30 | Wash. | 244..... | 236 |
| Seattle Brewing & M. Co. v. Dono- | | | | |
| frio | 59 | Wash. | 98..... | 221 |
| Security Sav. & Tr. Co. v. Loewen- | | | | |
| berg | 38 | Ore. | 159..... | 644 |
| Shea v. Skagit County..... | 68 | Wash. | 233..... | 171, 172 |
| Shemfield v. Union Oil Co..... | 82 | Wash. | 386..... | 532 |
| Shilshole Avenue, In re..... | 85 | Wash. | 522..... | 109 |
| Shilshole Avenue, In re..... | 94 | Wash. | 583..... | 117 |
| Shively v. Bowlby..... | 152 | U. S. | 1..... | 499 |
| Sidway v. Missouri Land & L. S. | | | | |
| Co. | 101 | Fed. | 481..... | 45 |
| Sjong v. Occidental Fish Co..... | 78 | Wash. | 4..... | 18 |
| Skinner & Mounce Co. v. Waite.... | 155 | Fed. | 828..... | 192 |
| Sloan's Estate, In re..... | 50 | Wash. | 86..... | 289 |
| Small v. Montgomery..... | 23 | Fed. | 707..... | 191 |
| Smith v. Alabama..... | 124 | U. S. | 465..... | 192 |
| Smith v. Driscoll..... | 94 | Wash. | 441..... | 412 |
| Smith v. Flathead River Coal Co.... | 64 | Wash. | 642..... | 636 |
| Smith v. Los Angeles etc. Ass'n.... | 78 | Cal. | 289..... | 563 |
| Soule v. Ocosta..... | 49 | Wash. | 518..... | 119 |
| Southbridge Sav. Bank v. Exeter | | | | |
| Machine Works..... | 127 | Mass. | 542..... | 521 |
| Spear v. Bremerton..... | 90 | Wash. | 507..... | 309 |
| Spokane v. Costello..... | 42 | Wash. | 182..... | 338 |
| Spokane County v. Allen..... | 9 | Wash. | 229..... | 250 |
| Spokane Valley L. & B. Co. v. | | | | |
| Dawson | 94 | Wash. | 246..... | 632 |
| Spreitzer v. Miller..... | 98 | Wash. | 601..... | 610 |

CASES CITED.

xxiii

| | | | Page |
|-------------------------------------|-----|-------------|-----------------------|
| Standard Oil Co. v. Anderson..... | 212 | U. S. | 215.....22, 24, 25 |
| Stans v. Balley..... | 9 | Wash. | 115..... 289 |
| Starret's Case | 1 | Dall. (Pa.) | 355..... 192 |
| Starwich v. Ernst..... | 100 | Wash. | 198..... 450 |
| State Bank, In re..... | 56 | Minn. | 119..... 584 |
| State Board of Agriculture v. Citl- | | | |
| zens' St. R. Co..... | 47 | Ind. | 407..... 162 |
| State v. Blaine..... | 64 | Wash. | 122..... 603 |
| — v. Buffum | 94 | Wash. | 25..... 424 |
| — v. Cushing | 17 | Wash. | 544..... 218 |
| — v. Gaasch | 56 | Wash. | 381.....535, 536 |
| — v. Hardwick | 63 | Wash. | 35.....535, 536 |
| — v. Hendricks | 32 | Kan. | 559..... 604 |
| — v. Jones | 80 | Wash. | 335..... 424 |
| — v. Kruger | 60 | Wash. | 542..... 602 |
| — v. Lance | 94 | Wash. | 484..... 217 |
| — v. Meyers | 9 | Wash. | 8..... 541 |
| — v. Palmer | 104 | Wash. | 396..... 601 |
| — v. Parmeter | 49 | Wash. | 435..... 424 |
| — v. Robinson | 12 | Wash. | 491..... 218 |
| — v. Roddle | 12 | S. D. | 433..... 252 |
| — v. Rousseau | 111 | Wash. | 533..... 541 |
| — v. Smith | 58 | Wash. | 235.....535, 536 |
| — v. Terrien | 111 | Wash. | 345..... 696 |
| State ex rel. American Freehold- | | | |
| Land Mtg. Co. v. Tanner. | 45 | Wash. | 348.....110, 119, 121 |
| — American Sav. Union v. | | | |
| Whittlesey | 17 | Wash. | 447..... 39 |
| — Barnes v. Blaine..... | 44 | Wash. | 218.....110, 119, 122 |
| — Board of Com'rs v. Clau- | | | |
| sen | 95 | Wash. | 214..... 174 |
| — Brislawn v. Meath..... | 84 | Wash. | 302..... 172 |
| — Carlson v. Superior Court. | 107 | Wash. | 228..... 212 |
| — Case v. Howell..... | 85 | Wash. | 281.....172, 173 |
| — Chicago, M. & P. S. R. Co. | | | |
| v. Public Serv. Com..... | 77 | Wash. | 529.....379, 380 |
| — Clark v. Superior Court... | 62 | Wash. | 612..... 210 |
| — Davis v. Clausen..... | 47 | Wash. | 372.....249, 251, 258 |
| — Funke v. Board of Com'rs.. | 48 | Wash. | 461.....249, 253 |
| — Galbraith v. Superior Court | 59 | Wash. | 621..... 623 |
| — Grays Harbor Log. Co. v. | | | |
| Superior Court | 82 | Wash. | 503.....209, 210 |
| — Harvey v. Sheehan..... | 269 | Mo. | 421..... 253 |
| — Johnson v. Clausen..... | 51 | Wash. | 548.....131, 296 |
| — Langley v. Superior Court. | 74 | Wash. | 556..... 103 |

| | | | <i>Page</i> |
|--|-----------------|----------|---------------|
| State ex rel. Lefebvre v. Clifford... | 65 Wash. | 313..... | 284, 285 |
| — Miller v. Superior Court... | 40 Wash. | 555..... | 103, 104 |
| — Milwaukee T. R. Co. v. Superior Court | 54 Wash. | 365..... | 210 |
| — National Bank v. Tacoma. | 97 Wash. | 190..... | 110, 119, 122 |
| — Nelson v. Yakey..... | 64 Wash. | 511..... | 285 |
| — Nixon v. Superior Court... | 87 Wash. | 603..... | 285 |
| — Olsen v. Board of Control of State Institutions.... | 85 Minn. | 165..... | 949 |
| — Patterson v. Superior Court | 102 Wash. | 331..... | 211 |
| — Peel v. Clausen..... | 94 Wash. | 166..... | 113, 131 |
| — Port of Seattle v. Wardall. | 107 Wash. | 606..... | 251 |
| — Postal Tel-Cable Co. v. Superior Court | 64 Wash. | 189..... | 210, 546 |
| — Preston Mill Co. v. Supe- rior Court | 91 Wash. | 249..... | 210 |
| — Seattle v. Carson..... | 6 Wash. | 250..... | 250 |
| — Security Sav. Soc. v. Moss. | 44 Wash. | 91..... | 110, 119, 122 |
| — Sherman v. Pape..... | 103 Wash. | 319..... | 131 |
| — Teeter v. Superior Court... | 110 Wash. | 255..... | 394 |
| — Thompson v. Powell..... | 108 Wash. | 561..... | 131 |
| — Titlow v. Centralia..... | 93 Wash. | 401..... | 628 |
| — Washington Public Service Co. v. Superior Court... | 86 Wash. | 155..... | 131 |
| — Washington W. P. Co. v. Savidge | 75 Wash. | 116..... | 342 |
| — Younger v. Clausen..... | 111 Wash. | 241..... | 254 |
| Steele v. Gold Fissure Gold Min. Co. | 42 Colo. | 529..... | 563 |
| Steuding v. Seattle Elec. Co..... | 71 Wash. | 467..... | 681 |
| Stewart v. Ramsay..... | 242 U. S. | 128..... | 191, 197, 199 |
| Stewart's Estate, In re..... | 26 Wash. | 32..... | 492 |
| Stolp v. Blair..... | 68 Ill. | 541..... | 604 |
| Stolze v. Stolze..... | 111 Wash. | 398..... | 699 |
| Strand v. Griffith..... | 97 Fed. | 854..... | 145 |
| Straus v. Buchman..... | 89 N. Y. Supp. | 226..... | 78 |
| Sullivan v. New Bedford G. & E. L. Co..... | 190 Mass. | 288..... | 28 |
| Sutliff v. Lake County Com'rs.... | 147 U. S. | 230..... | 310, 311 |
| Swigart v. Baker..... | 229 U. S. | 187..... | 129 |
| Taft v. Quinsigamond Nat. Bank... | 172 Mass. | 363..... | 584 |
| Taylor v. Decatur Mineral & L. Co. | 112 Fed. | 449..... | 45 |
| Taylor v. Jeter..... | 23 Mo. | 244..... | 337 |
| Thompson v. Riggs..... | 5 Wall. (U. S.) | 663..... | 584 |
| Thompson v. Seattle Park Co..... | 94 Wash. | 539..... | 417 |

CASES CITED.

xxv

| | | | Page |
|------------------------------------|-----|--------------------------|----------|
| Thompson-Spencer Co. v. Thompson | 61 | Wash. 547..... | 207 |
| Torgeson v. Hanford..... | 79 | Wash. 56..... | 419 |
| Tory v. Bast..... | 3 | W. V. C. 63..... | 193 |
| Totten & Hogg Iron etc. Co. v. | | | |
| Muncie Nail Co..... | 148 | Ind. 372..... | 569 |
| Traders' Nat. Bank v. Schorr..... | 20 | Wash. 1..... | 613 |
| Tribune Ass'n v. Sleeman..... | 12 | N. Y. Civ. Proc. 20..... | 193 |
| Triplett v. Bergman..... | 82 | Wash. 639..... | 574, 575 |
| Uhler v. Olympia..... | 87 | Wash. 1..... | 309 |
| United States Fld. & Guar. Co. v. | | | |
| Cascade Const. Co..... | 106 | Wash. 478..... | 164 |
| United States Fld. & Guar. Co. v. | | | |
| Lee | 58 | Wash. 16..... | 221 |
| United States v. Edme..... | 9 | Serg. & R. (Pa.) 147.... | 193 |
| United States v. Union Pac. R. R. | | | |
| Co. | 91 | U. S. 72..... | 299 |
| Universal Motor Co. v. McGeorge... | 104 | Wash. 344..... | 346 |
| Vertress v. Head & Matthews..... | 138 | Ky. 83..... | 470 |
| Wade v. Donau Brewing Co..... | 10 | Wash. 284..... | 514, 516 |
| Waite v. Santa Cruz..... | 148 | U. S. 302..... | 316 |
| Walker & Brock v. Ranlett..... | 89 | Vt. 71..... | 584, 585 |
| Washington Brick, L. & M. Co. v. | | | |
| Traders Nat. Bank..... | 46 | Wash. 23..... | 586 |
| Washington County v. Williams... | 111 | Fed. 801..... | 314 |
| Washington Printing Co. v. Osner. | 99 | Wash. 537..... | 207 |
| Washington Safe Dep. & Tr. Co. v. | | | |
| Lietzow | 59 | Wash. 281..... | 288 |
| Weiffenbach v. Puget Sound B. & D. | | | |
| Co. | 103 | Wash. 240..... | 347 |
| Welch v. Northern Bank & Tr. Co. | 100 | Wash. 349..... | 450 |
| Wendt v. Industrial Ins. Com..... | 80 | Wash. 111..... | 129 |
| Wentworth v. McDonald..... | 78 | Wash. 546..... | 299 |
| West Chicago Street Ry. v. O'Con- | | | |
| nor | 85 | Ill. App. 278..... | 682 |
| Western Dry Goods Co. v. Hamilton | 86 | Wash. 478..... | 303 |
| Weyh v. Boylan..... | 85 | N. Y. 394..... | 313 |
| White v. North Yakima..... | 87 | Wash. 191..... | 296, 342 |
| Wilson v. Aberdeen..... | 19 | Wash. 89..... | 119 |
| Wilson v. Aberdeen..... | 25 | Wash. 614..... | 303 |
| Wilson v. Cochran..... | 31 | Tex. 677..... | 481 |
| Wilson v. Donaldson..... | 117 | Ind. 356..... | 192 |
| Wilson Sewing Machine Co. v. | | | |
| Wilson | 22 | Fed. 803..... | 191, 194 |

| | | | <i>Page</i> |
|------------------------------------|-----|-------------------------|-------------|
| Wimple v. Patterson..... | 117 | S. W. (Tex. C. A.) 1034 | 470 |
| Withrow Lumber Co. v. Glasgow | | | |
| Inv. Co. | 101 | Fed. 863..... | 569 |
| Withrow Lumber Co. v. Glasgow | | | |
| Inv. Co. | 106 | Fed. 363..... | 570 |
| Wood v. Lost Lake & C. M. Co..... | 23 | Ore. 20..... | 560 |
| Woody v. Benton Water Co..... | 54 | Wash. 124..... | 145 |
| Woods v. Dickinson..... | 18 | App. D. C. (7 Mackey) | |
| | | 301 | 71 |
| Woods v. Insurance Co. of Pennsyl- | | | |
| vania | 82 | Wash. 563..... | 61 |
| Wright v. Suydam..... | 59 | Wash. 530..... | 636 |
| Yeisley v. Smith..... | 82 | Wash. 693..... | 18 |

STATUTES CITED AND CONSTRUED

| CONSTITUTION OF WASHINGTON. | | REMINGTON'S CODE—Continued. | |
|-----------------------------|-------------|--------------------------------|---------------|
| | <i>Page</i> | | <i>Page</i> |
| Art. 1 § 16..... | 111 | Section 1231, 1232, 1239, 1240 | |
| “ 2 § 25..... | 242, 250 | | 69, 70, 71 |
| “ 3 § 25..... | 251 | “ 1719, 1722..... | 186, 556 |
| “ 4 § 13..... | 251 | “ 1740, 1752.... | 30, 450, 622 |
| “ 8 § 6..... | 171, 174 | “ 1919, 1920, 1921.... | 423. |
| “ 11 § 8..... | 251 | “ 2167..... | 602 |
| “ 17 §§ 1, 2..... | 499 | “ 2265..... | 540 |
| | | “ 3000-6, 3000-12, | |
| | | 3000-13..... | 127-130 |
| | | “ 3303-2..... | 156, 163, 164 |
| | | “ 3909..... | 388 |
| | | “ 4422, 4433..... | 332, 477 |
| | | “ 4998-5011..... | 295 |
| | | “ 4998-5013.... | 295, 298, 299 |
| | | “ 5013-1..... | 297 |
| | | “ 5029..... | 128, 129, 131 |
| | | “ 5085-5093.... | 171, 174, 175 |
| | | “ 5094-5101-7..... | 171, 173 |
| | | “ 5101-1—5101-7..... | 172 |
| | | “ 5482, 5487..... | 246, 247 |
| | | “ 5623, 5634, 5635, 5636 | |
| | | | 544 |
| | | “ 5857-1..... | 207, 208 |
| | | “ 5872..... | 544, 545 |
| | | “ 5878-2 (d)..... | 543 |
| | | “ 6059-2, 6059-34, 6059-45 | |
| | | | 52, 57 |
| | | “ 6059-211, 6059-221... | |
| | | | 370, 371 |
| | | “ 6250-6256..... | 308 |
| | | “ 6364..... | 621 |
| | | “ 6550, 6553..... | 242, 246 |
| | | “ 6571-3, 6571-4..... | 247 |
| | | “ 6590, 6599..... | 247 |
| | | “ 6604-1..... | 249 |
| | | “ 7151, 7162..... | 289, 290 |
| | | “ 7507..... | 76 |

| REMINGTON & BALLINGER'S CODE. | |
|-------------------------------|---------|
| Section 3002-3005, 3008-3011. | |
| | 125-128 |
| “ 3394..... | 312 |
| “ 7642..... | 315 |
| “ 7998..... | 391 |
| “ 9219, 9252, 9253, 9259, | |
| 9262..... | 36 |

| REMINGTON'S CODE. | |
|---------------------|----------|
| Section 144..... | 71 |
| “ 171..... | 288 |
| “ 191..... | 268 |
| “ 207..... | 196 |
| “ 209-1, 209-2..... | 283 |
| “ 220..... | 675 |
| “ 228..... | 412, 676 |
| “ 265..... | 87 |
| “ 367..... | 303 |
| “ 583..... | 556 |
| “ 602..... | 575 |
| “ 925..... | 546 |
| “ 953..... | 108, 114 |
| “ 983..... | 290 |
| “ 1014, 1015..... | 103 |
| “ 1133..... | 632, 633 |
| “ 1134..... | 567 |
| “ 1146..... | 566 |

REMINGTON'S CODE—*Continued.*

| | <i>Page</i> |
|------------------------|---------------|
| Section 7787-7796..... | 108 |
| “ 7892-21..... | 116 |
| “ 7998..... | 391 |
| “ 8008..... | 307, 309, 315 |
| “ 8145-1, 8145-12.... | 496, 497 |
| “ 8213..... | 246, 248 |
| “ 8626-1..... | 295 |
| “ 8626-13, 8626-62.... | 379 |
| “ 8781, 8784-8787.... | 641-643 |

SESSION LAWS.

| | |
|---------------------------------|--------------------|
| 1854, p. 353..... | 295, 300, 301 |
| 1881, pp. 1-157, §§ 1-763.... | 71 |
| pp. 105, 156, §§ 409, 410, 758 | 71 |
| 1889-90, p. 379, § 64..... | 331 |
| 1891, p. 40..... | 71 |
| p. 246 | 482 |
| 1893, p. 445..... | 125 |
| 1897, p. 58..... | 255 |
| 1899, pp. 128, 129, §§ 4, 7.... | 308 |
| 1903, p. 63..... | 535 |
| 1905, p. 145..... | 295 |
| 1907, p. 13, § 1..... | 132 |
| pp. 275, 536, 691..... | 295 |
| 1909, p. 191..... | 295 |
| p. 580 | 306 |
| 1911, p. 279, § 211..... | 370 |
| p. 418 | 297 |
| p. 538 | 295, 298, 299, 301 |
| p. 545, § 8..... | 296 |
| 1913, p. 62, § 1..... | 172 |
| p. 156 | 496 |
| p. 196, §§ 6, 14..... | 127 |
| p. 200, § 12..... | 129 |
| p. 412, §§ 1, 3..... | 207, 208 |
| 1915, p. 59..... | 295, 297 |

SESSION LAWS—*Continued.*

| | <i>Page</i> |
|---------------------------------|--------------|
| 1915, p. 280, § 2..... | 156, 163 |
| p. 375 | 497 |
| p. 486, § 5..... | 543 |
| 1917, p. 60, § 17h..... | 534, 538 |
| pp. 109, 116, 117, 120, | |
| §§ 7, 8, 10 | 255, 256 |
| p. 448, § 4..... | 618-620, 622 |
| p. 495 | 352 |
| p. 582 | 35 |
| p. 653, § 45..... | 492 |
| p. 670, § 103..... | 319, 320 |
| p. 760, 762, §§ 1, 3, subd. 9 | |
| | 526-528 |
| 1919, pp. 309-312, §§ 4, 6-8... | |
| | 241, 243-245 |
| pp. 309, 312, 313, 315, | |
| §§ 7-10, 18..... | 254-257 |
| pp. 319, 320, 327, §§ 28, 32, | |
| 49 | 256, 257 |
| pp. 321, 322, 328, §§ 24, 39, | |
| 50 | 244, 245 |
| p. 414 | 387-391 |

CHARTERS.

| | |
|----------------------------|-----|
| Seattle, art. 4, § 28..... | 122 |
| Seattle, art. 16, § 4..... | 341 |

ORDINANCES.

| | |
|--------------------------------|--------------------|
| Centralia, No. 281..... | 305, 306 |
| Centralia, No. 302..... | 306 |
| Seattle, No. 29,834..... | |
| | 107, 109, 110, 115 |
| Seattle, No. 30,389..... | 115 |
| Seattle, No. 38,339..... | 118 |
| Seattle, Nos. 38,374, 38,377.. | 109 |

ERRATA

Page 133, second syllabus, third line, for *they were* read *she was*.

Page 304, third syllabus, last line, for *effect* read *affect*.

Page 504, third syllabus, second line, for *makers* read *maker*.

Page 525, second syllabus, third line, for *allowing* read *allow*.

Page 537, second syllabus, last line, for *punishment* read *punish*.

ERRORS NOTED IN PREVIOUS VOLUMES

Vol 110 Wash.

Page 639, line two, for 762 read 672.

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 15531. Department Two. April 7, 1920.]

FLORENCE FISH COMPANY, *Respondent*, v. EVERETT
PACKING COMPANY, *Appellant*.¹

EVIDENCE (179) — PAROL EVIDENCE—SHOWING INTENT—EXPLANATION OF NAUTICAL TERMS. In an action upon a fishing contract oral evidence of experienced fisherman as to the meaning and the duties in those waters of a "boat to stand by," which the company had agreed to furnish to the fishing boat, is admissible as explanatory of technical words or those having a general meaning and a meaning peculiar to the business.

STIPULATIONS (2)—CONSTRUCTION—ADMISSION OF EVIDENCE. A stipulation that the conversations leading up to a fishing contract about the use and purpose of a "stand-by boat" to be furnished may be admitted without objection, does not preclude a party to it from offering further evidence as to the meaning of the terms "stand by."

DAMAGES (66, 74)—MEASURE OF DAMAGES—BREACH OF CONTRACT—LOSS OF PROFITS—COMPUTATION. The measure of damages through breach of a contract to furnish a "boat to stand by" to assist in fishing operations, is the loss in catch which would have been made if the boat had been furnished, where on repeated demands promises were made to furnish the boat and a boat was furnished for but five days out of eighteen days of fishing; since the conduct was such as to mislead plaintiff.

SAME (113)—EVIDENCE—LOSS OF PROFITS—BREACH OF FISHING CONTRACT—ESTIMATES—ADMISSIBILITY. Upon an issue as to the damages for breach of a contract to furnish a "boat to stand by" to assist a fishing boat, evidence of the catch on days when the assist-

¹Reported in 188 Pac. 792.

ance was furnished, and on other days when compelled to fish without it, is admissible to show the loss in the catch, it appearing that the fish were running in great schools which had to be avoided and could not be handled without the aid of the stand-by boat.

APPEAL (487)—DECISION—MATTERS DETERMINED—SEGREGATION OF DAMAGES. Where the jury segregated the damages on different causes of action, error as to one will not cause a reversal as to the other, and a new trial will be confined to the one reversed.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered April 1, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract, after a trial on the merits. Affirmed in part and reversed in part.

Kerr & McCord, Stephen V. Carey, and Cooley, Horan & Mulvihill, for appellant.

Ballinger, Battle, Hulbert & Shorts, for respondent.

FULLERTON, J.—In September, 1918, the respondent, Florence Fish Company, and the appellant, Everett Packing Company, each a corporation organized under the laws of this state, entered into the following contract:

“This Agreement, made and entered into this..... day of September, 1918, by and between The Florence Fish Company, a corporation, with its principal place of business at Seattle, Washington, party of the first part, and the Everett Packing Company, a corporation, doing business at Everett, Washington, party of the second part,

“Witnesseth: Whereas, the party of the first part is the owner of that certain gasoline fishing boat named ‘Anna J.’ and is engaged in catching fish for sale; and

“Whereas, the Everett Packing Company is engaged in buying and packing fish and is interested in the National Fish Company of British Columbia; and

“Whereas, the said party of the second part desires the party of the first part to take its said boat to British Columbia on or about October 1st, 1918, and to engage in catching fish for the National Fish Com-

Apr. 1920]

Opinion Per FULLERTON, J.

pany of British Columbia, and to continue the catching of fish up to November 1st, 1918;

"Now, therefore, for the consideration hereinafter mentioned, the parties hereto agree as follows:

"The party of the first part will take its said fishing boat 'Anna J.' to British Columbia waters and will engage in catching fish from about October 1st to November 1st, 1918, and will deliver said fish as caught into scows of the National Fish Company of British Columbia at or near the fishing grounds; said scows to be placed and furnished by said National Fish Company.

"It is further agreed that the party of the second part through said Fish Company will keep during said fishing season a gasoline boat to stand by to assist the party of the first part in case it needs help or assistance in any particular.

"The above named boat 'Anna J.' is registered in the United States, and it is agreed that the party of the second part shall assume the entire responsibility itself, or through the said National Fish Company, of procuring the registration or permission or license to operate and fish in the waters of British Columbia, and said second party agrees to pay all costs and expenses in connection therewith.

"The ordinary method of operating a fishing boat of the character of the 'Anna J.' is as follows:

"Seven (7) men are employed on said boat and the proceeds from the entire catch of fish is divided into eleven (11) parts, one part going to each man and four parts to the boat.

"It is agreed that the party of the second part will pay twenty cents (20c) apiece for all dog salmon caught by the party of the first part through the operation of its said fishing boat, and that the proceeds from said fish shall be divided as above stated; provided, however, it is agreed that the party of the second part hereby guarantees to the party of the first part at least sixteen hundred dollars (\$1,600) for its four (4) shares. In other words, it is agreed that in case the four shares of the entire catch for the period above mentioned amounts to less than sixteen hundred

dollars (\$1,600) the party of the second part will make up the difference so that the boat will receive not less than sixteen hundred dollars (\$1,600) for its operation during said period, and in case the four shares amount to more than sixteen hundred dollars (\$1,600), the said party of the first part is to receive the full amount of said four shares.

"It is further agreed that the party of the second part will pay for the fuel or gasoline consumed by said boat during the time it is engaged in said fishing in British Columbia waters.

"It is further mutually understood and agreed that in case the Canadian Government should, during the life of this contract, promulgate any orders or restrictions covering the fishing industry which would in any manner interfere with the successful operation of said boat 'Anna J.' in British Columbia waters in such fishing industry, then and in that event it is agreed that said boat may be transferred to Puget Sound waters during the remainder of the period covered by this contract, and the fish caught during said latter period to be delivered to the Everett Packing Company or its scows. It being understood thereby that conditions governing the taking of fish from British Columbia waters shall remain as they now exist. Everett Packing Company to pay market price for fish caught in Puget Sound waters.

"In witness whereof, this agreement has been executed in duplicate the day and year first above written.

"The Florence Fish Company,

"By Edw. E. Snekvik.

"Everett Packing Company,

"By J. O. Morris."

After the execution of the contract, the respondent caused its boat to proceed to the waters named, where it arrived on the afternoon of October 3rd. From that time until the end of the month, the boat engaged in fishing, and during that time fish were caught and delivered, which at the agreed price entitled the respondent to the sum of \$15,452.40. Of this sum, \$420 was paid, leaving a balance due of \$15,032.40.

Apr. 1920]

Opinion Per FULLERTON, J.

In this action, the respondent sues not only to recover the balance due on the price of the fish, but sues in damages as for a breach of the clause of the contract which we have italicized, averring in his complaint with reference thereto that the appellant did not keep a boat to stand by and assist the respondent when it needed help and assistance during any part of the time its boat was engaged in fishing except for about three days, and that it was damaged by reason thereof in the sum of \$5,000. The answer of the defendant put in issue the allegations of the complaint as to the amount due for the fish caught, and the allegations with respect to the breach of the contract and the damages alleged to have been suffered; and by an affirmative defense pleaded a performance of the contract on its part. The cause was tried by the court sitting with a jury, and resulted in a verdict in favor of the respondent,

“for fish caught and delivered at \$15,032.40 with interest thereon at the rate of six per cent per annum from November 1, 1918, and also for the sum of \$5,000 on account of damages sustained by reason of the breach of the contract.”

Judgment was entered in accordance with the verdict, and the appeal is from the entire judgment.

There was no controversy in the court below, nor is there in this court, over the right of the respondent to recover for the fish caught; the sole controversy being over the right to recover in damages. On this branch of the case, the appellant makes three principal contentions; first, that the court erred in the admission and exclusion of evidence; second, that it erred in that it applied a wrong measure of damages; and third, that it erred in its instructions to the jury.

To an understanding of the first of these contentions, a reference to certain matters in the record is neces-

sary. In support of its cause of action, the appellant called the captain of the fishing boat as a witness. This person was an officer of respondent, and represented it in the negotiations which led up to the execution of the contract. During the course of his examination, he was asked whether in these preliminary negotiations he had talked with the representative of the appellant regarding the necessity of a stand-by boat while fishing in the waters in which he was contemplating fishing, and answering in the affirmative, was further asked whether prior to that time he had "learned anything about the necessity of the use of a stand-by boat in doing fishing over in those waters." At this point, counsel for the appellant interrupted, when the following colloquy occurred:

"Mr. Carey: I think it would be well now to have an understanding. I understand, from the drift of this examination, that you concede that this contract is subject to explanation by oral testimony?

"Mr. Hulbert: I think so, your honor please. That is the position that we have taken—have taken all the way through. I think it is right. I think inasmuch, if your honor please, as the contract simply provides—I will read, now, that portion of the contract that is in dispute so we will have it thoroughly before the court and jury. This is the provision that provides for the stand-by boat:

"It is further agreed that the party of the second part through said National Fish Company will keep during said fishing season a gasoline boat to stand by to assist the party of the first part in case it needs help or assistance in any particular."

"Now then, the position that I think the defense can take in this case, which I think is right, is that, under that statement in the contract, that the question of just what is the purpose of a stand-by boat are questions that should be explained—gone into. They have taken that position, and we have agreed with them on that, in settling of the pleadings all the way through,

Apr. 1920]

Opinion Per FULLERTON, J.

and I think it is clearly so under the ruling of the court on that matter—that the purpose and use of a stand-by boat would not be fully explained in the contract.

“The Court: Well, I haven’t any doubt about that, but I want this understood—I want to understand you on this. Do you both concede that, in determining the purposes and uses of a stand-by boat, you can go into the conversations had between the parties in negotiating the contract with reference to that particular boat? That is a different question.

“Mr. Hulbert: Yes, sir, that is a different question, your honor please. I have serious doubts, your honor please, whether or not that can be done.

“The Court: Well, I want it agreed upon or determined whether or not the court must pass on that as a question of law or whether the parties will agree that each one may produce testimony of those who are familiar with the execution of the contract as to what was said during the negotiations with reference to the use to which the stand-by boat would be put. Does the stipulation extend that far or does it—

“Mr. Hulbert: I don’t—I am inclined to think that the court’s intimation is a correct one—that the defendant here agreed to furnish a stand-by boat. Now then, what the conversation was before or after or at the time of signing the contract as to what they were going to use this stand-by boat for may not be competent. The only question then would be the custom and the usage, etc., to show what was meant by stand-by boat among the fishermen or people engaged in that line of business.

“The Court: I would have no hesitation in holding that that could be explained, what was meant by that and what they were usually used for. That I have no doubt about. You may proceed.

“Mr. Hulbert: Well, I want— It would be a good time to have the question settled now, because—

“The Court: Very well.

“Mr. Hulbert: What do you think about it?

“Mr. Carey: I think we had better have the whole story as to what was said and done.

"Mr. Hulbert: I do not want to get any error in the case, your honor please.

"The Court: Well, it would not be error if you both agree to it.

"Mr. Hulbert: Very well. Let the record show, then, that upon this question of the use of a stand-by boat, that it is agreed in open court, by counsel upon both sides that what was said before the entering into of this contract about the use and purpose of the stand-by boat may be admitted, without objection.

"Mr. Carey: The record may so show."

Following this stipulation, the respondent's counsel proceeded to examine the witness then on the stand, and others afterwards called, concerning the conversations had between himself and the appellant's representative as to the use and necessity of a stand-by boat in fishing in the particular waters mentioned, the evidence being to the effect that such a boat was necessary because of the nature of the waters in which the fishing must be done and because also of the peculiar action of the fish. In substance, the evidence tended to show that the stand-by boat had two purposes; the one to hold the fishing boat in place while the net was being hauled in after a cast, and the other to carry the overload of fish, that is, such fish as might be caught in excess of the carrying capacity of the fishing boat. Evidence was also introduced as to the meaning of the term "stand-by boat," as used in those waters, the witnesses testifying that the term was used to designate a boat the purpose of which is to furnish aid to a fishing boat in the manner indicated.

The appellant was also permitted to give its version of conversations had during the preliminary negotiations concerning the purposes of a stand-by boat, as well as the understanding of its officers as to the meaning of the term as used in the contract. Their version, in brief, was that the waters where the fishing was to be

Apr. 1920]

Opinion Per FULLERTON, J.

done were at times turbulent, that the place was in the open ocean off a shore having precipitous banks, and that the representative of the respondent was fearful that the fishing boat might, as the result of the hazards commonly following purse seine fishing, become helpless, drift ashore, and be endangered if not lost; that the purpose of the stand-by boat was to assist in cases of this sort, and not to aid it in its fishing operations.

. In further support of its contentions with respect to the meaning of the contract, the appellant called a sea captain and proceeded to interrogate him concerning the purposes and uses of a stand-by boat. Objection was made to this testimony and sustained by the court, whereupon the appellant offered to prove by the witness, "that in marine circles generally, including the salmon fishing business, the term 'stand-by,' or 'stand-by boat,' or 'stand-by service' has a well defined meaning, and means simply a boat not to engage with the seine boat or crew in the operation of fishing or handling the seine, but simply means a boat to be in the vicinity to assist the purse seine boat in case of distress." At the conclusion of this offer, the court again sustained the objection, and sustained objections to similar testimony offered by the appellant through other witnesses.

The court sustained the objection for the reason that, in his opinion, the contract was not ambiguous, or subject to explanation by oral testimony; that the terms of the contract, since it required the appellant "to keep during the fishing season a gasoline boat to stand by to assist the [respondent] in case it needs help or assistance in any particular," required the appellant to keep such a boat standing by for the purposes of aiding in the fishing operations of the respondent's boat in instances when it needed such aid as well as in instances

conceded by the appellant; and that to permit the introduction of evidence to show that the meaning of the contract was other than this would be to "admit evidence tending to modify the terms of a written contract."

In this conclusion, it is our opinion that the trial court erred. It is a general rule, of course, that a written contract may not be varied by showing a prior or contemporaneous parol agreement, but it is equally the rule that parol evidence is admissible to define and explain the meaning of words or phrases in a written contract which are technical, or which have two meanings, the one common and general and the other peculiar to the business, craft, or trade to which the contract in which it is used relates. Such evidence does not vary or add to the written contract; it but translates its language from the language of the particular business to the language of the people generally. So in this instance we do not think an ordinary person having only a general knowledge of things nautical or of the fishing business would understand, from a reading of the contract, the purposes of a "stand-by boat," even though the expression is followed by words somewhat explanatory of its meaning. Certainly he would not understand that such a boat was to assist in the ordinary fishing operations of the boat which it was to stand by. That this was the view of the respondent's counsel at the trial, is shown by the quotation we have made from the record. It is shown, also, from the quotation that this was the first impression of the trial judge. The fact that the trial judge afterwards changed his views was not necessarily error, but in our opinion he was right in his first impression and in error in his second.

The respondent argues in this connection that the stipulation entered into limits the testimony on the

Apr. 1920]

Opinion Per FULLERTON, J.

question to the preliminary negotiations between the parties, and that the appellant cannot now complain because the effect of the court's ruling was but to hold him to the stipulation, even if erroneous otherwise. But aside from the fact that the respondent did not itself confine its evidence to that form of testimony, we cannot so read the stipulation. As we read it, the respondent did not question the admissibility of the testimony explanatory generally of the expression used, but sought the stipulation for the purposes of testimony which was thought to be of doubtful admissibility. Our conclusion, therefore, is that the court erred in rejecting the proffered testimony.

The second contention is that the trial court permitted testimony of an expert nature from witnesses who did not show proper qualifications to testify on the subjects concerning which they were interrogated. These objections we shall not discuss at length. It is sufficient to say that, under the liberal rules applicable in such cases, no error was committed in this respect.

Another contention is that the court applied a wrong measure of damages. It appeared from the evidence that, of the eighteen days the fishing boat was actually engaged in fishing, a stand-by boat was furnished to assist it for a total period of about five days. The assistance was not continuous for that period of time, but intermittently during the entire period for single days and parts of days at a time, seemingly as the appellant could procure such a boat. As the measure of its damages, the court permitted the respondent to show the number of fish caught on the days when it had the assistance of the stand-by boat, and the number caught on the days when no such assistance was furnished, and permitted, also, the captain of the fishing boat and the members of the crew to give estimates

as to the difference between the number of fish that could have been caught with the aid of the assisting boat and the number actually caught. Against this, the appellant makes two contentions, the first of which is that the measure of damages is not the loss in catch but what it would cost to have procured an assisting boat; and the second, that the testimony is at best but speculative and intangible.

But, contrary to the first branch of the contention, we think the measure of damages is the loss in catch. It cannot be successfully denied that this was the actual loss suffered by the respondent, and usually the actual loss furnishes the measure of recovery. It was, of course, the respondent's duty to minimize its loss as far as possible, and under certain circumstances the rule might have required it of itself to procure an assisting boat. But we think the circumstances shown here excused it. The appellant, according to the evidence it was the privilege of the jury to believe, at no time refused to furnish the assisting boat. Repeated demands were made upon it for such a boat, and at each demand the appellant promised to comply. Its conduct was such as to mislead the respondent, and the jury were warranted in finding that it was so misled.

On the second branch of the objection, certainly the differences in the number of the catch on the days when it had the assisting boat and the days when it did not, furnished a very tangible basis upon which to estimate the actual loss. Nor was it error to permit those actually engaged in the work and who knew the conditions to give an estimate of such losses. The evidence shows it was not in getting fish within the confines of the cast of the net which caused the difficulty, but that it was caused by getting an overload which could not be successfully handled without the

Apr. 1920]

Opinion Per FULLERTON, J.

aid of an assisting boat. Indeed, the evidence discloses that the fish were running in great schools, and that these had to be avoided when the fishing boat was operating without assistance.

Complaint is made of the instructions of the court to the jury. But these seem pertinent to the view the court took of the contract. However, if they are not so, it would serve no purpose to point out their defects, since a retrial must be had upon a theory to which they will be inapplicable.

For the error in the rejection of the proffered testimony, the judgment must be reversed and remanded for a new trial, in so far as it permits a recovery in damages. Since, however, the judgment is severable—that is to say—since it allows a recovery for the fish caught and delivered in one sum and the damages in another, there is no reason for reversing it as an entirety. It will therefore stand affirmed as to the first mentioned sum, and reversed and remanded for a new trial as to the latter. Neither party will recover costs in this court. Let the order be entered accordingly.

HOLCOMB, C. J., BRIDGES, TOLMAN, and MOUNT, JJ.,
concur.

[No. 15561. Department Two. April 8, 1920.]

ALEX PEARSON, *Respondent*, v. ARLINGTON DOCK
COMPANY *et al.*, *Appellants*.¹

PLEADING (104)—AMENDMENT TO CONFORM TO PROOF. In an action for personal injuries sustained by a stevedore through the alleged negligence of a stevedore company in directing the operation of an electric winch, it is proper to allow the complaint to be amended to conform to proof of negligence in continuing operations after knowledge of the incompetence of the employee operating the winch, brought out on cross-examination of plaintiff's witnesses; where no prejudice or surprise was shown.

MASTER AND SERVANT (66, 149)—EMPLOYMENT OF INCOMPETENT SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A stevedore company, bound to furnish a stevedore a safe place to work in the hold of a vessel, is sufficiently shown to be negligent by evidence that it continued operations after knowledge of the incompetence of the winchmen furnished by another company to operate a winch, employed to lower heavy iron pipes into the working place.

TRIAL (126) — VERDICT — FORM — SEGREGATION OF DAMAGES—SURPLUSAGE. In an action against joint tortfeasors, a verdict against both defendants in the sum of \$3,750 "each," must be taken as a verdict for the sum of \$7,500; and the jury having no right to segregate the damages, that portion of the verdict must be taken as surplusage.

APPEAL (467)—HARMLESS ERROR—VERDICTS. Irregularity in a verdict against two joint tortfeasors for \$7,500 in attempting to segregate the damages and assess half against each, is cured by plaintiff's remission and reduction of the verdict to the sum of \$3,000.

MASTER AND SERVANT (21)—RELATION OF PARTIES—INJURY TO THIRD PERSON—LOAN OF SERVANT. Where a Stevedore company was to furnish only the labor in loading, and the ship company had agreed to furnish the equipment and machinery, and thereupon hired an electric winch of a dock company, together with the dock company's servant to operate the winch, the operator was not loaned to the stevedore company, but to the ship company and the latter was the master of such servant and liable for his negligence, under the "loaned servant" doctrine.

¹ Reported in 189 Pac. 559.

Apr. 1920]

Opinion Per BRIDGES, J.

SAME (21)—RELATION OF PARTIES—LOANING INCOMPETENT SERVANT. The fact that a dock company, renting its electric winch to a ship company, loaned its servant to the ship company to operate the winch does not relieve it from liability for injuries to an employee of a stevedore company, occasioned by the incompetence of the operator; where he was negligently retained by the dock company after knowledge of his incompetence and request made by the stevedore company to discharge him and furnish a competent operator, since the doctrine of loaned servant relieves the first master from liability for the servant's negligence only, and not from its own negligence in furnishing an incompetent servant.

Cross-appeals from a judgment of the superior court for King county, Ronald, J., entered February 28, 1919, upon the verdict of a jury rendered in favor of the plaintiff, as against one defendant, and granting a motion for judgment *non obstante* as to the other defendant, in an action for personal injuries sustained by a stevedore in loading a vessel. Reversed on plaintiff's appeal.

Roberts & Skeel and *J. J. Geary*, for appellant North Coast Stevedoring Company.

James R. Gates and *Henry W. Pennock*, for respondent and cross-appellant.

J. Speed Smith, *Henry Elliott, Jr.*, and *Bogle, Merritt & Bogle*, for respondent Arlington Dock Company.

BRIDGES, J.—The plaintiff was injured while acting in the capacity of a stevedore in loading the steamship "Sono Maru," which vessel was owned by the Trans-Oceanic Company and lay alongside of the Arlington dock, at Seattle. The complaint charged the defendant Arlington Dock Company with negligence in employing an incompetent man to operate the electric winch located on its wharf. The negligence charged against the defendant North Coast Stevedoring Company was that its hatch tender negligently directed the operation of the electric winch. There was a ver-

dict in favor of the plaintiff and against both defendants. Each defendant moved for judgment notwithstanding the verdict. The motion of the dock company was sustained; the motion of the stevedoring company was denied, as was also its motion for new trial. The court required the plaintiff to agree to accept \$3,000 in lieu of the larger amount found by the verdict, otherwise a new trial would be granted the stevedoring company. The plaintiff consented to the reduction, and judgment in the sum of \$3,000 was entered against the stevedoring company. That company has appealed. The plaintiff has appealed from that portion of the judgment dismissing the dock company out of the case.

The facts are substantially as follows: The stevedore company made a contract with the steamship company to load the "Sono Maru" from the wharf of the Arlington Dock Company. The plaintiff was one of its employees and, at the time of his injury, was at work in the hold of the vessel. It employed a hatch tender, who had charge of the loading operations and gave signals to the winchman. It furnished nothing but labor; it had no loading equipment. That equipment was to be furnished by the ship company. Located on the second floor of the wharf was an electric winch owned by the dock company. The ship's winch would not reach and lift the cargo. The use of the dock winch was needed in the loading operations. The ship company made arrangements with the dock company for the use of this electric winch to assist in loading the vessel. It agreed to pay that company fifty cents per hour for the use of the winch; the dock company was to furnish a man to operate the winch, and the ship company was to pay whatever amount the dock company paid by way of wages to the winchman. The cargo being loaded consisted of long, heavy

Apr. 1920]

Opinion Per BRIDGES, J.

iron pipes. These were on freight cars which had been brought to the wharf. In loading, the lines of the dock winch would be attached to a bundle of pipes which would be lifted high up in the air by means of its power. But this winch was unable to swing the load over the boat. For this purpose the lines of the boat winch were also attached to the load. When the load was over and above the hatch, it was the duty of the winchman to slowly lower it. At the time of plaintiff's injury, the dock winchman suddenly, and without any signal, permitted the load to drop from a considerable height. The result was that the chains which enclosed the bundle of piping came loose and some of the pipes were thrown through the hatch into the hold, striking the plaintiff and injuring him. Goldspring was the name of the dock winchman. The testimony tended to show that he was incompetent and that it was his incompetency which caused plaintiff's injury; that, long before plaintiff's injury, which was the second or third day of the loading, both defendants knew of such incompetency; that the stevedore company had made complaint to the dock company and requested the discharge of Goldspring, but the dock company took no action till after plaintiff's injury, when it discharged him. Plaintiff had no knowledge of Goldspring's incompetency, nor means of acquiring such knowledge. There was no testimony tending to establish the negligence charged in the complaint against the stevedoring company. However, at the close of plaintiff's case, he asked permission to amend his complaint to conform to the proof, so that it would allege as follows:

"That the North Coast Stevedoring Company was negligent in this: That the North Coast Stevedoring Company, after its knowledge of the incompetency of Goldspring, failed and neglected to cease work and sus-

pend operations, and as a result thereof plaintiff was injured.”

The court permitted the amendment over the objection of the stevedore company.

We will first consider the appeal of the stevedore company. It contends that the trial court committed error in permitting the plaintiff to amend his complaint during the progress of the trial. The testimony tended to prove that the dock winchman was incompetent and that the stevedore company had knowledge of such incompetency and the consequent dangers thereof, but permitted the plaintiff to work in the hold of the vessel without informing him of the danger. Much of this testimony was brought out by the cross-examination of plaintiff's witnesses by the attorney for the stevedore company. This court has, time and again, held that a complaint may be amended to conform to the testimony. *Yeisley v. Smith*, 82 Wash. 693, 144 Pac. 918; *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172; *Sjong v. Occidental Fish Co.*, 78 Wash. 4, 138 Pac. 313. It does not appear to us that the stevedore company was prejudiced or surprised by the amendment, and we think the court was justified in its ruling. But it is contended that the amendment should not have been allowed because in no event would the stevedore company be liable to the plaintiff for the incompetency of the servant of the dock company. This cannot be the law. Plaintiff was at work in the hold of the vessel and had no means of knowing, and did not know, of Goldspring's incompetency. If the stevedore company knew of it, it was bound either to suspend work or notify plaintiff of the danger. It owed the duty to him of furnishing him a reasonably safe place in which to work. The fact, if it be a fact, that the incompetent workman was the servant of the

Apr. 1920]

Opinion Per BRIDGES, J.

dock company or someone else, could not relieve the stevedore company of this duty.

In the case of *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 23 Am. St. 688, 10 L. R. A. 696, the facts were that the ice company undertook to place a structure on foundations furnished by the landowner, which foundation was in a dangerous condition and that condition was known to the ice company for whom the decedent Keifer was working. Under these circumstances the plaintiff was injured, and the court said:

“ ‘The ice machine company was negligent in directing deceased to work in this place of danger, it having knowledge, and he being without notice or knowledge, of such danger, and the successive concurrent negligence of appellants thus united in causing the death of, Keifer.’ . . . And the ice machine company with knowledge of its insufficiency, went on and placed the tank thereon, and thereby became responsible for injuries to any of its servants it might send to work upon the tank, without giving them notice of the danger to which they were exposed. Here the negligence of each of three defendants directly concurred in producing the death of Keifer.”

Nor have we any doubt that there was ample proof showing negligence on the part of the stevedore company to take the case to the jury. Its head man on the work knew that the dock winchman was incompetent, and not only complained thereof to the winchman himself, but also to the foreman of the dock company, and asked that he be removed and a competent man put in his place.

The stevedore company further complains of a number of instructions given by the court to the jury. A detailed discussion of them would serve no good purpose. We have carefully examined all of them and can find no serious fault with them.

It is further contended that the verdict is irregular and void. It was as follows: "We, the jury in the above entitled cause, do find for the plaintiff and against both defendants in the sum of \$3,750 each Arlington Dock Co., North Coast Stevedoring Co., Dollars (\$7,500)." While the verdict is somewhat awkward, it is perfectly plain that the jury meant to find a verdict of \$7,500 for the plaintiff against both defendants, each defendant to pay one-half of that amount. The jury did not have any right to segregate this amount and make each defendant liable for a portion thereof, consequently that portion of the verdict where the jury undertakes to do so must be considered surplusage. *San Marcos Electric Light & Power Co. v. Compton*, 48 Tex. Civ. App. 586, 107 S. W. 1151; *San Antonio & A. P. R. Co. v. Bowles*, 88 Tex. 634, 32 S. W. 880; *Olson v. Nebraska Telephone Co.*, 87 Neb. 593, 127 N. W. 916.

The trial court required the plaintiff to consent to a reduction of the amount of this verdict to \$3,000. This action of the trial court would be sufficient in itself to cure any irregularity in the verdict.

It is argued that the verdict, even as reduced, is excessive. We have carefully read the testimony and are satisfied that the verdict, as reduced, is not excessive.

The conclusion to which we have come makes it necessary to affirm the judgment as to the stevedore company.

We have hereinbefore stated that the trial court granted the motion of the dock company for judgment notwithstanding the verdict. The plaintiff has appealed from this action of the court and it remains for us now to consider this view of the case. It appears from the record that the reason given by the trial court for its judgment in favor of the dock company

Apr. 1920]

Opinion Per BRIDGES, J.

was that its alleged incompetent dock winchman had been loaned to the stevedore company or the ship company to be used in the loading of the vessel, and was not the servant of the dock company at the time of the injury. Both the plaintiff and the stevedore company take the position that the winchman was the servant of the dock company, while the latter argues that it had hired its winchman to either the stevedore company or the ship company; that, in any event, he was not its servant at the time of plaintiff's injury.

In order to determine this controversy, it will be useful to again look at the testimony. Therefrom it appears that in loading a vessel the stevedore company furnishes only labor and does not furnish any appliances whatsoever. In this instance, the stevedore company agreed with the owner of the ship to furnish the labor for the purpose of loading the vessel; the ship company was to furnish all necessary machinery and appliances for that purpose. The cargo to be loaded was not within reach of the vessel's winch and lines and it was necessary to use the winch owned by the dock company. The ship company, therefore, made a contract with the dock company whereby its electric winch was to be used in the loading. The arrangement between the owner of the ship and the dock company was that the latter would receive from the former fifty cents per hour for the use of the winch, and in addition thereto, the ship company was to pay the dock company the amount which it was required to pay to the operator of the winch. Later, the dock company made out to the ship company its bill in accordance with the contract, and that bill was paid by the ship company. During the first half-hour of the loading operations, the stevedore company had one of its men operate the dock winch, but at the end of that time the dock company refused to allow the stevedore com-

pany man to continue; sent him away, and put Goldspring, its servant, on the job. Later, the stevedore company complained to Goldspring about the incompetent manner in which he was handling the winch, and he gave them to understand that he would accept no orders from them. On one or two occasions thereafter, the stevedore company's foreman complained to the foreman of the dock company about the incompetency of Goldspring, requesting that he be discharged and someone else put in his place. The dock company agreed to look into the matter, but did nothing until after the plaintiff was injured, when the dock company discharged Goldspring.

The respective parties have elaborately argued the question of "loaned servant." This leads us into a branch of the law where the dividing lines are often exceedingly dim. The general rule of the loaned servant doctrine is certain and easy; the difficulty arises in applying the facts of a given case to the rule. The rule is nowhere better stated than by Mr. Justice Moody in the case of *Standard Oil Co. v. Anderson*, 212 U. S. 215, where he says:

"To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

The loaned servant doctrine is based upon, and grows out of, the negligent act of the servant. In a proper case, the master is, of course, liable for the negligence of his servant. But it is sometimes the case that, in a sense, a servant may have two masters. Then arises the question, which master is liable? The first and general master may hire his servant out to a second and special master to perform only and exclusively

Apr. 1920]

Opinion Per BRIDGES, J.

the work of the latter. In that case, the general rule that the master is liable for the negligence of the servant will not apply to the first master because the servant is not engaged in his work. Let us see, first, whether there was a loan by the dock company to the stevedore company. The only thing the latter had to do with the loading was to furnish the labor; no duty devolved upon it to furnish either machinery or equipment. The ship company was to provide all of that. It made arrangements with the dock company for the use of its winch and a man to operate it. They were hired to do a certain portion of the loading of the vessel, and for that service the dock company was to be paid by the steamship company. The dock company employed Goldspring to operate the machine; it received complaints about his competency and finally discharged him. He looked to it for his pay and was paid by it. The fact that the dock winchman worked in harmony and concert with the stevedore men, or that the hatch tender of the latter gave signals to the winchman, is nothing to indicate whose servant the winchman was. Such things were only conveniences in loading. The same thing would have happened if the winchman had been concededly the servant of the dock company. There is an entire lack of all the essentials which must exist to form the relationship of master and servant between the winchman and the stevedore company. Manifestly, therefore, the winch and winchman were not loaned to the stevedore company.

But did the dock company loan its winch and servant to the ship company? Was it a part of the work or duty of the dock company to load this ship? We think not. It was not interested in that work. Neither the ship nor the cargo belonged to it. It was the owner and operator of a wharf, and of that only. It did not

solicit from the ship company nor the stevedore company the work of loading the vessel, nor did it make application to any person to have its winch and winchman used in that work. The ship company had agreed with the stevedore company, not to hire someone to assist the latter in the loading, but to furnish the necessary equipment. It paid the dock company a small rental per hour for the use of the winch and it paid the man who operated it. It is true that, in the first place, the dock company paid the operator, but the agreement provided that it should be repaid that identical sum by the ship company. The dock company was to be paid fifty cents per hour for the use of the winch, and not fifty cents an hour for services to be rendered in the loading of the vessel. It did not do the loading; it simply hired its machine and operator to the ship company to be used for that purpose. It is true the dock company hired, and probably had the right to discharge, the operator, but that fact alone is not inconsistent with the idea of the loan of a servant. It employed the operator in order that it might hire him and the machine together as one implement, as it were, to the ship company.

We think these facts make it clearly appear that the dock company loaned its winch and servant to the ship company and that the latter was the master of the servant who operated the winch. This conclusion is not inconsistent, but rather in harmony, with the decision in the case of *Standard Oil Co. v. Anderson*, *supra*. There the facts were that the Standard Oil Company owned the wharf and the cargo. It employed one Torrence, a master stevedore, to load the ship. The plaintiff, Anderson, was a stevedore employed by Torrence to assist in the loading. The winch or hoisting apparatus used in the loading belonged to the oil company and was a part of its wharf. The plaintiff

Apr. 1920]

Opinion Per BRIDGES, J.

was injured through the negligence of the winchman. The court held that the winchman was the servant of the oil company and that the latter was liable to the plaintiff. The material differences between the facts of that case and this one are as follows: in that case the defendant was the owner of the cargo; such was not the fact here; there the defendant was directly interested in the loading, but not so here; there the winchman was hired and paid by the defendant; here he was hired but not paid by the defendant; there the steamship company agreed to pay the defendant \$1.50 per ton for doing the hoisting; here the defendant was to be paid 50 cents per hour for the use of its winch. These are important differences and, we think, clearly distinguish that case from this. We have read all or nearly all of the cases cited in the briefs, as well as others, but cannot take the space or time to discuss them here. Certainly none of them is directly in point and none of them sheds any more light than, or adds any argument not contained in, the *Standard Oil Co. case, supra*. The following are some of the more important cases generally supporting the conclusion to which we have come: *Olsen v. Veness*, 105 Wash. 599, 178 Pac. 822; *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, 50 N. E. 500, 66 Am. St. 537; *Quinn v. National Sugar Refining Co.*, 102 App. Div. 47, 92 N. Y. Supp. 95; *Hartell v. T. H. Simonson & Son Co.*, 218 N. Y. 345, 113 N. E. 255; *Philadelphia & Reading R. Coal & Iron Co. v. Barrie*, 179 Fed. 50.

We are impelled to hold that the dock company's winch and its operator were hired or loaned to the ship company, and that the winchman was, at the time of the injury of plaintiff, the servant of the latter. But it does not follow that the dock company is not liable to the plaintiff. By hiring its winch and servant to the ship company, it impliedly agreed to furnish a

winch which was reasonably effective to do the work of loading the vessel, and an operator thereof who was reasonably competent. In other words, its contract obligated it to furnish a reasonably competent winchman. It knew the use to which it was intended to put the winch; it knew the stevedore company was loading the ship, and for that purpose it would employ and have on the ship various servants; it knew the dangers which would exist if it furnished a defective winch or an incompetent winchman. While it could not be held for any negligence of the winchman, because the latter was not its servant, yet it would be liable for its own negligence in furnishing an incompetent winchman. It is not necessary that there be any contractual relationship between the plaintiff and the dock company to make the latter liable to the former for its negligence. It owed the duty to furnish a competent winchman, not only to the ship company, but to the plaintiff and to all persons who might lawfully be within reach of the dangers created by an incompetent winchman. While the dock company may have used, and supposedly did use, reasonable care in selecting the winchman, yet there was ample testimony that, after he had been at work for a few hours, it learned of his incompetency. It received that information long before the plaintiff was injured. Under the court's instructions, this case was submitted to the jury only on the question of the competency of the winchman. The jury was told that there could not be any recovery for any negligent act of the winchman. The jury found against the dock company, and, in so doing, it must have found that the winchman was incompetent and that the dock company knew of such incompetency. The doctrine of loaned servant is not decisive here, and can be applicable in any case only when recovery is based upon the negligence of the servant. The dock

Apr. 1920]

Opinion Per BRIDGES, J.

company is liable, not because of Goldspring's negligence, but because of its own negligence in employing and retaining an incompetent man to operate its winch. This case is controlled by that doctrine which we find in 18 R. C. L. 542, as follows:

"A person undertaking to furnish machinery or appliances for the use of the servants of another assumes a duty to furnish proper and safe appliances; and a negligent performance of such a duty, resulting in injuries to one engaged in doing the work or lawfully using the appliances, imposes a liability on the person so furnishing the same for injuries sustained in consequence of such negligence. The obligation does not depend on a contractual relation between the person injured and the person whose negligence causes the injury, but on a failure to perform a duty assumed by one which results in injury to another."

The case of *Johnson v. Spear*, 76 Mich. 139, 42 N. W. 1092, 15 Am. St. 298, is very similar to the one here. There the defendant owned a coal dock, and vessels laden with coal were in the habit of unloading there. One Watkins had the contract for unloading the vessel in question. He was to get twenty-one cents per ton, and the defendant, the dock owner, was to furnish the dock engine, wheelbarrow, planks, etc. Watkins was to furnish the man to do the work. The plaintiff, who was in the employ of Watkins, was injured because of the breakage of a part of the hoisting apparatus. The court said:

"If the injuries result from the negligence of the defendant while work is being done upon his premises, and through his fault in not keeping them in a suitable and safe condition, he is liable to any servants of the contractor for injuries resulting to them from defects therein; not because there is any contract obligation between the parties, but arising out of his obligation or duty to provide safe appliances for the servants of the contractor to use, and to keep his premises upon

which such servants are at work in a reasonably safe condition, whether the contract provides for it or not. . . . The contractor, in this case, was employed to do a particular job . . . The defendant furnished the outfit, which included a stationary engine upon his premises, and the appliances connected therewith, in hoisting the coal from the vessels to his dock. The circumstances left the proprietor charged with the duty which regularly attached to him to see that the machinery and appliances so furnished did not endanger the safety of others."

If the dock company had furnished a winch which was defective and dangerous, then, under all the authorities, it would be held liable to any person who was injured because of such defects. There cannot be any legal distinction between the duty of the dock company in hiring out a defective winch and its duty in hiring out an incompetent operator thereof. Each is defective; each is incompetent. *D'Almeida v. Boston & Maine R.*, 209 Mass. 81, 95 N. E. 398, Ann. Cas. 1913C 751, and particularly the note to that case which cites many authorities; *Kiser v. Suppe*, 133 Mo. App. 19, 112 S. W. 1005; *Sullivan v. New Bedford Gas & Edison Light Co.*, 190 Mass. 288, 76 N. E. 1048; *Cleveland C. C. & St. L. R. Co. v. Berry*, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33, and elaborate note to that case; *Niemeyer v. Weyerhaeuser*, 95 Iowa 497, 64 N. W. 416.

We think the trial court was right in submitting the whole case to the jury, and was in error when it entered judgment for the dock company notwithstanding the verdict. The judgment is affirmed as to the stevedore company and reversed as to the dock company, with instructions to enter judgment on the verdict against both defendants in the sum of \$3,000.

HOLCOMB, C. J., FULLERTON, TOLMAN, and MOUNT, JJ., concur.

Apr. 1920]

Opinion Per Curiam.

[No. 15580. Department Two. April 8, 1920.]

HOLLY-MASON HARDWARE COMPANY, *Appellant*, v.
J. M. SCHNATTERLY *et al.*, *Respondents*.¹

APPEAL (102).—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY—LAPSE OF TIME. An appeal from an order refusing a writ of assistance to put a mortgagee in possession during the period of redemption will be dismissed, where before the hearing, the period of redemption had expired and any decision would be academic and without effect upon any controversy between the parties.

Appeal from an order of the superior court for Spokane county, Blake, J., entered September 9, 1919, denying an application for a writ of assistance, after a hearing before the court. Affirmed.

Samuel R. Stern, for appellant.

Plummer & Lavin, for respondents.

PER CURIAM.—The appellant, Holly-Mason Hardware Company, holding a mortgage upon certain real property executed by the respondents Schnatterly and wife, brought suit to foreclose the same, and obtained a decree of foreclosure on November 25, 1918. An order of sale was issued on the decree and the property was sold to the appellant on March 1, 1919, which sale was confirmed by the court ordering the sale, on March 29, 1919.

On July 14, 1919, the appellant applied to the court for a writ of assistance to obtain possession of the property, averring, in an affidavit filed in support of the application, that the appellant was entitled to such possession and had been so entitled since the sale on March 1, 1919; that the respondents were in possession thereof and had refused to surrender the property to

¹ Reported in 189 Pac. 545.

the appellant, although demand had been made upon them therefor.

The respondents resisted the application on the ground that, at the time of the execution of the mortgage, at the time of its foreclosure, and at all times intervening and since they had occupied the premises as a home for themselves and their family and had, prior to the sale thereof under the mortgage foreclosure proceeding, filed a declaration of homestead thereon, under and pursuant to the statutes of the state of Washington, and by reason thereof were entitled to the possession of the premises until the period of redemption expired, namely, until March 1, 1920.

The application came on for hearing before the court on September 9, 1919, and on that day the court entered an order denying the same. Notice of appeal from the order was given by the appellant on the same day. The appeal was allowed to take its regular course, and the cause was submitted to this court on February 4, 1920, on the question whether the trial court erred in denying the writ of assistance.

From the foregoing statement, it is at once apparent that the question this court is called upon to decide is academic, in so far as any right of the parties to the appeal is affected thereby, and that it was such at the time the cause was submitted to this court for decision. As the respondents contended only for the right of possession during the period of redemption, their right expired on March 1, 1920, and as the statute regulating the appellate procedure (Rem. Code, § 1740) provides that a remittitur upon a judgment of this court shall not be sent down to the lower court until thirty days after the decision is filed, under no possible condition could the court, since the cause was submitted, have rendered a decision that would have determined any controversy between the parties.

Apr. 1920]

Statement of Case.

Courts will not knowingly determine moot questions, however much such a determination may be desired by the parties, nor will it determine the merits of an appeal in order to determine which of the parties shall pay the costs.

So in this instance we decline to pass upon the issue presented, and direct that the order appealed stand as affirmed, without costs to either party.

[No. 15646. Department Two. April 8, 1920.]

T. G. CRONKHITE *et al.*, *Respondents*, v. PAT. WHALEN,
Appellant, JOHN DITTENTHOELER *et al.*,
Defendants.¹

NEGLIGENCE (3, 38)—FIRES—EVIDENCE—SUFFICIENCY. A threshing machine agent whose primary duty was to see that a new machine worked properly is liable for loss of grain by fire communicated from the machine, where it appears that he assumed control of the operations and disregarded suggestions as to the danger from sparks carried towards the grain by a strong wind.

SAME (17)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER. An owner of grain destroyed by fire from a new threshing machine is not guilty of contributory negligence, where the company's agent assumed control of the operations and persisted in finishing the job after the owner requested him to stop on account of the danger from sparks blowing towards the grain.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered March 17, 1919, upon findings in favor of the plaintiffs, in an action for damages for loss of property by fire, tried to the court. Affirmed.

H. J. Snively, for appellant.

Parker, LaBerge & Parker, for respondents.

¹ Reported in 189 Pac. 94.

BRIDGES, J.—This was a suit by respondents, plaintiffs below, against appellant and defendants, to recover damages because of the destruction by fire of certain grain. The case was tried to the court without a jury. There was a judgment in favor of the plaintiffs and against the defendants Whalen and Parchese. Whalen has appealed. It appears that, during the progress of the trial, the defendant Dittenthoelel was dismissed out of the action.

The respondents owned certain stacks of grain which they desired to have threshed. They employed the defendants Dittenthoelel and Parchese to do the threshing. The appellant, Whalen, was the local agent for the J. I. Case Company, manufacturers and sellers of threshing machines. As such agent, he had just sold to his codefendants one of these threshing machines. It was a part of his duty as such agent to help start up any new thresher and to see that it worked satisfactorily. For this purpose the appellant, Whalen, was on the ground looking after the operation of the machine. During the second day's operation and while the appellant was present, sparks from the engine running the threshing machine set fire to and destroyed considerable of the unthreshed grain. The spark arrester had either fallen off or had been blown off by the wind, which on that day was blowing strong from the machine toward the stacks of grain. The result was that an unusual amount of sparks were emitted and the fire resulted.

Prior to the fire, the defendant Dittenthoelel was taken sick and left the operations. The defendant Parchese was hauling wood and water to the machine, and was present at the operations very little of the time. While unquestionably the appellant was present primarily for the purpose of putting the machine in operation, and making such adjustments and repairs

Apr. 1920]

Opinion Per BRIDGES, J.

as were necessary to that end, yet, according to the weight of the testimony and the findings of the trial court, he assumed control over the operation to a considerable extent. It appears that one of the respondents was afraid there would be a fire, and suggested that operations cease while the wind was blowing, but appellant gave directions to finish the job they were on. He also gave directions concerning the fuel to be used, and in a number of other ways assumed direction of operations. It is true, appellant denies having taken any charge of operations, and asserted that he was present only for the purpose of adjusting the machinery, but the trial court found:

“That the defendant, Pat. Whalen, who had had fifteen years’ experience in handling threshing machines, took charge of the operations of said machinery in the threshing of said grain, and directed its operations; . . . that the plaintiff suggested to said Whalen that it was dangerous to proceed with the work under such conditions, and that said defendant, Whalen, carelessly and negligently instructed the engineer, who was operating said engine, to go ahead and finish the job”

The appellant’s chief argument is that the testimony was insufficient to support a judgment against him. We have carefully read the testimony and conclude that the court’s findings are amply supported. That the fire resulted from the negligent manner in which the threshing was done, there ought not to be any question; and if, as the trial court found, the appellant had charge of the threshing operations, then it would logically follow that he would be liable to the respondents for the damage done.

Appellant further contends that the evidence was insufficient to show the amount of grain destroyed or the value thereof. It must be confessed that the evidence

in this regard is very unsatisfactory, particularly that portion with reference to the amount of grain destroyed. Probably this unsatisfactory condition resulted from the apparent assumption by everybody connected with the trial that all, or practically all, of the grain in the stacks was burned. At any rate, the defendant offered no testimony with regard to these matters, and we think there is sufficient testimony of the plaintiff to justify the judgment.

It is also asserted by appellant that the respondents were guilty of contributory negligence, because they knew the conditions and did not complain. This position, however, overlooks testimony of at least one of the plaintiffs, to the effect that he desired the operations be stopped on account of the high wind and the resultant danger.

If this judgment appears to appellant to be a hardship, he has only himself to blame. If he had confined himself to his duties of making such adjustments and repairs as were necessary to cause the thresher to operate properly, he would not have been held liable. But the weight of the testimony shows that he went further and, at least to considerable extent, supervised the threshing job, and in so doing he made himself responsible for the results.

We do not find any error, and therefore affirm the judgment.

HOLCOMB, C. J., FULLERTON, TOLMAN, and MOUNT, JJ., concur.

Apr. 1920]

Opinion Per HOLCOMB, C. J.

[No. 15691. Department Two. April 8, 1920.]

SECURITY SAVINGS SOCIETY, *Respondent*, v. SPOKANE
COUNTY *et al.*, *Appellants*.¹

TAXATION (173)—CONSTITUTIONAL LAW (65, 77)—INTEREST ON DELINQUENT TAXES—CHANGE OF LAW. Laws 1917, p. 582, amending Rem. Code, §§ 9219, 9252, 9253, 9259 and 9262, and reducing the rate of interest on delinquent taxes from fifteen to twelve per cent, which took effect June 8, 1917, operates upon certificates issued prior to the taking effect of the act, since the rights of the certificate holder are not contractual and no vested rights are affected.

SAME (173)—STATUTES (85)—RETROACTIVE EFFECT—CHANGE IN INTEREST CHARGE. While Laws 1917, p. 582, reducing the rate of interest on delinquent taxes, operates upon certificates issued prior to the taking effect of the act, it is wholly prospective from and after the date of its taking effect.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 10, 1919, granting a writ of mandamus to compel a county treasurer to issue a redemption certificate upon the payment of delinquent taxes and interest. *Affirmed*.

Joseph B. Lindsley and *Fred J. Cunningham*, for appellants.

P. C. Shine, for respondent.

HOLCOMB, C. J.—A writ of mandate was granted by the superior court of Spokane county, commanding the treasurer of that county to issue and deliver to plaintiff a redemption certificate upon the payment of delinquent taxes and interest upon certain described real estate.

The only question involved on this appeal is the construction of ch. 142, Laws of 1917, p. 582, in respect to its effect upon the rate of interest to be charged upon taxes becoming delinquent subsequent to the

¹ Reported in 189 Pac. 260.

passage of the 1917 act. That act, in so far as this appeal is concerned, amended §§ 9219, 9252, 9253, 9259, and 9262, Rem. & Bal. Code, to the extent of changing the rate of interest specified in each of those sections from fifteen to twelve per cent. Upon which delinquent taxes a charge of fifteen per cent interest shall be made, and upon which taxes twelve per cent, is the determination which is here sought.

The law provides that, unless paid, taxes shall become delinquent after May thirty-first of each year. The old act further provides that interest at the rate of fifteen per cent per annum should be charged upon such unpaid taxes from date of delinquency until paid. The 1917 act provides that interest at the rate of twelve per cent per annum shall be charged upon such unpaid taxes from date of delinquency until paid.

The 1917 act came into effect on June 8, 1917. The taxes here in question became delinquent on June 1, 1917, and the certificate of delinquency was issued on or as of the same date. The order of the lower court allowed an interest charge of fifteen per cent on the original amount of the certificate up to and including June 7, 1917, and an interest charge of twelve per cent from and after June 8, 1917.

It is contended by appellant that the writ requiring the treasurer to reckon interest from two dates—the date of delinquency of the tax and June 8, 1917—carried an unlawful method of computation. Appellant's argument seems to be that all taxes becoming delinquent prior to June 8, 1917, had attached to them a fixed interest charge of fifteen per cent which remained with them until redemption, regardless of any change in the law effective between their delinquency and their redemption. To concur with this argument we should be obliged to hold that the certificate holder's rights were contractual and became fixed as of the date

Apr. 1920]

Opinion Per HOLCOMB, C. J.

of the contract, that is, the certificate of delinquency. We are precluded from any such holding, however, for in *Everett v. Adamson*, 106 Wash. 355, 180 Pac. 144, in speaking of the relation between the holder of a certificate of delinquency and the county, we said:

“The respondent argues that the statute was not intended to apply to certificates issued prior to its enactment, . . . and that, after the transfer of the lien from the state to the individual, evidenced by the certificate, the state thereafter has no more right to change the rank of that certificate than an individual would have to modify the terms of a contract after his rights under that contract had passed to a third party . . . Respondent’s position is postulated almost entirely upon the theory of contractual relationship.

“We cannot concede that contract is analogous to a proposition of this kind. To do so would be to invite a serious curtailment of the sovereign power of taxation—that power which is one of the supreme powers of the state. If we were to hold that the principle of contract applied in one instance in the field of taxation, we would logically be compelled to extend the whole of the principles of contract to the entire field of taxation. We have held consistently that taxation is a matter involving the sovereign power of the state and subject only to the limitations which that sovereignty has imposed upon itself, either in the constitutional or positive law of the state. To read into the operations of the tax laws the particular principles which form the accretion of judicial precedent in matters of individual relationship and of contract would be an unwarranted invasion of the legislative power.”

Interest is merely a charge for the use or forbearance of money. In such case as this it has the character of both a penalty and an interest charge. As such the state may raise or lower it when it pleases. The state reduced it from and after June 8, 1917.

Maintaining that the *Adamson* case has no application to the issues in the present case, appellant says:

“Our contention on this phase of the subject is that the certificate holder should be reimbursed by the redemptioner for the amount of money he has actually invested in the certificate. If the purchase price of the certificate includes interest on delinquent taxes up to the time of the purchase at the rate of fifteen per cent per annum the certificate holder should, at least be reimbursed for that amount.”

Under the writ as issued below, if the certificate of delinquency was purchased on or prior to June 7, 1917, the purchase price would include interest on delinquent taxes up to the time of the purchase at the rate of fifteen per cent per annum. If the certificate was purchased after June 7, 1917, the purchase price would include interest on the delinquent taxes up to and including June 7, 1917, at the rate of fifteen per cent per annum, and at the rate of twelve per cent per annum after that date. We are unable to follow appellant's argument that a purchaser will not be reimbursed for any moneys paid out under such a construction of the statute. If he purchased subsequent to June 7, 1917, and paid an interest charge of fifteen per cent per annum on the delinquent taxes from date of delinquency to date of purchase of certificate, the overpayment of interest subsequent to June 7, 1917, was made contrary to the law as it existed at the time he made the purchase, and his misapprehension as to the meaning of the law can in no way affect it.

Appellant further contends that such a holding, as the above discussion would indicate, makes the law retroactive, contrary to its positive inferences. The 1917 act could be considered retroactive, if at all, only so far as it related to interest charges after June 7, 1917, on delinquent taxes for the years 1915 and 1916. As has already been pointed out, however, the right of a purchaser to interest does not become fixed at the time

Apr. 1920]

Statement of Case.

of the purchase of a certificate of delinquency. The change as effected by the 1917 act was wholly prospective from and after June 8, 1917, the time it became effective. *State ex rel. American Sav. Union v. Whittlesey*, 17 Wash. 447, 50 Pac. 119.

We are impelled to hold that the lower court was correct in its holding and in the granting of the writ and should be affirmed. It is so ordered.

MOUNT, FULLERTON, BRIDGES, and TOLMAN, JJ., concur.

[No. 15700. Department Two. April 8, 1920.]

BERNHARD KAHAN, *Appellant*, v. ALASKA JUNK
COMPANY *et al.*, *Respondents*.¹

CORPORATIONS (180)—MAJORITY STOCKHOLDERS—CONTROL OF COMPANY. A majority stockholder has a right to control the business policy of the company if he acts in a reasonably competent and efficient manner.

CORPORATIONS (216, 218)—RECEIVERS—APPOINTMENT—GROUNDS—CRIMINAL ACTS. A receiver will not be appointed of a solvent corporation because of dishonest or criminal acts committed by a majority stockholder in control of its business, unless the evil acts are systematic and habitual and a part of its general business, and injunctive relief would not afford a complete remedy.

SAME (216, 218). A minority stockholder, seeking the appointment of a receiver in such a case, must show that he has exhausted all other remedies and tried to stop the criminal acts.

Appeal from a judgment of the superior court for King county, Sheeks, J., entered November 4, 1919, in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

¹ Reported in 189 Pac. 262.

Preston, Thorgrimson & Turner, Piles & Halverstadt, and Jones, Riddell & Brackett, for appellant.

Reynolds, Ballinger & Hutson and Donworth, Todd & Higgins (Hyman Zettler, of counsel), for respondents.

BRIDGES, J.—For many years prior to 1918, the appellant and the respondent Falk, as copartners, had been engaged in the junk business in the city of Spokane, Washington, and for a somewhat similar period, the respondent Schwartz had been engaged in a like business in the city of Seattle. In June, 1918, the agreed value of the assets of the firm of Kahan and Falk was \$116,000, and the agreed value of the assets of the business belonging to Schwartz was \$498,000. For some time prior to 1918, these parties had discussed a consolidation of their assets and energies. On May 6, 1918, a preliminary written consolidation agreement was executed by the parties. On June 12, 1918, a final and full agreement was entered into which took the place of the preliminary agreement. All of the parties to this action, except the Alaska Junk Company and the bank, were parties to this final agreement. That instrument provided that a corporation should be created under the name of the Alaska Junk Company, with a capital stock of \$500,000, consisting of 5,000 shares, each of the par value of \$100. The parties subscribing to such capital stock were as follows: Frank Schwartz, 3,838 shares; Louis Dulien, 1 share; Mayo Cahen, 1 share; Bernhard Kahan, 580 shares; and Isidore E. Falk, 580 shares. Schwartz was to turn over to the corporation all of his assets, for which the company was to issue him the shares for which he had subscribed, and pay him the sum of \$24,200 in cash out of money subsequently earned by it. Dulien and Cahen were to pay cash for their stock.

Apr. 1920]

Opinion Per BRIDGES, J.

Kahan was to pay for his 580 shares by making over to the corporation his undivided one-half interest in the business of himself and his partner, and Falk was to pay for his shares in a similar manner. It was further provided that Schwartz should sell to the appellant 620 of his shares for \$62,000, and that such shares should be made out in the name of the appellant and be deposited in escrow with the respondent Union National Bank, of Seattle. This purchase price, with certain interest, was to be paid within fifteen years. Schwartz was to have the power to vote such stock till paid for. Certain provisions were made whereby any dividend declared upon this stock held in escrow, and upon the stock for which the appellant subscribed, was to be delivered to Schwartz and applied on the purchase price of the 620 shares. Schwartz also agreed to sell Falk a similar number of his shares on substantially the same terms as he had agreed to sell to appellant. The respondent Dulien also agreed to purchase from Schwartz 1,200 shares of stock upon terms not necessary to here detail. The contract further provided that, if any party desired at any time to sell his stock or any part of it, he should first offer it to the other stockholders. It was further agreed that Schwartz should be made the president of the corporation, Falk the vice-president, appellant the treasurer, and Dulien the secretary, and that each should give his time to the affairs of the company and receive \$500 each per month for compensation.

Pursuant to this agreement, the Alaska Junk Company, a corporation, was created and its stock issued, and each of the parties made over to the corporation the assets according to the agreement. The new company then commenced to transact business, and continues so to do.

On March 11, 1919, the appellant commenced this action. The complaint alleged most of the facts which we have heretofore given, and further alleged that Schwartz, in order to induce the appellant to enter into the business arrangement heretofore mentioned, made fraudulent and untruthful representations to appellant concerning contracts which he, Schwartz, then had for the sale of junk and the price at which the same had been sold, which misrepresentations were to the appellant's great material injury, and that Schwartz had fraudulently misrepresented to the appellant the value of his business and his assets; other false representations are alleged to have been made by Schwartz. Appellant says he relied upon such false and fraudulent representations and became a member of the said corporation as a result of such reliance and not otherwise; that Schwartz had a majority of the capital stock of the corporation and had control of its business and of its board of directors, and caused the business to be carried on without consulting the appellant, and in a manner contrary to his wishes and contrary to the material welfare of the company, and caused such business to be transacted in a wrongful and deceitful manner, and that such corporation, under Schwartz' management and control, was habitually and systematically guilty of thievery and robbery, and its business was systematically criminal; that it was the habit and custom, when carloads of scrap iron would arrive unweighed at the corporation's place of business in Seattle, to remove from such cars several tons of material, and then cause the cars to be weighed and settlements to be made based upon such false weights; that it was also the habit and custom of the company, when cars loaded with scrap iron, and which had previously been weighed, arrived at the place of business of the junk company, to remove quantities of

Apr. 1920]

Opinion Per BRIDGES, J.

material therefrom, and then forward the remainder of the same car to purchasers as of the original tonnage. Other like fraudulent practices are alleged to be indulged in by the corporation under the direction and control of respondent Schwartz. It was alleged that such dishonest dealings were carried on systematically and had become and were a part of the business, all to the danger of the solvency of the company. It was further charged that the appellant objected to such fraudulent practices but, being a minor stockholder, has been unable to stop them and, as such stockholder, is compelled to have the appearance of participating in such wrongful and fraudulent conduct. He prays that the Union National Bank be restrained from doing anything with the capital stock so held by it in escrow; that a receiver be appointed; that the corporation be dissolved, and that its assets be distributed among the stockholders.

The answers of the various defendants are substantially general denials as to all wrongdoing. The trial court, after a full hearing, made a judgment dismissing the action. The plaintiff has appealed.

The questions involved are largely those of fact. We have conscientiously read all of the abstract of the testimony, consisting of more than two hundred pages, and much of the statement of facts, of nearly six hundred pages. In our opinion, the record fails to show that Schwartz was guilty of any material misrepresentations of fraud in bringing about the so-called consolidation of the business of the appellant and himself. Before going into this corporation the appellant not only had ample opportunity to examine all of the business affairs of Schwartz, but actually did make such examination. There is very little testimony tending to show that the property which Schwartz turned into the corporation was of less value than the amount

agreed upon between the parties. We are convinced that the appellant went into this business because he thought it would be to his material advantage so to do, and that he went into it with his eyes open and all the cards on the table. To a very large extent, Schwartz has controlled, and does now control, the business affairs and policy of the company, and it may be that he had not consulted with the appellant regarding the conduct of the business to any considerable extent; but it must be remembered that Schwartz' interest in the corporation is several times greater than the interest of the appellant, and that Schwartz was and is, by great odds, the largest stockholder. Such being the case, he would have a right to dictate the business policy of the company so long as he did so in a reasonably competent and efficient manner. The law has always recognized the right of a majority stockholder of a corporation to control its business and affairs, and a court of equity will never interfere with such control except for the very best of reasons. The testimony shows that this corporation is thriving and that it is neither insolvent nor in danger of insolvency. As a matter of fact, it has made money most, if not all, of the time since its organization.

The chief thing in this case which gives us pause is the charge that the respondents, other than the bank, have caused, and still do cause, the business affairs of the corporation to be carried on in a dishonest and criminal manner. Much testimony, for and against this charge, was presented.

If it be conceded that a court of equity has power to appoint a receiver of a corporation which is a going and prosperous concern and is neither insolvent nor in danger of insolvency, simply because it does things which are dishonest, to what extent must such practices go before such power will be exercised? Cer-

Apr. 1920]

Opinion Per BRIDGES, J.

tainly not for one or three or five such acts out of hundreds or thousands of business transactions. Where should the line be drawn? How many of such dishonest acts are necessary before the court will appoint a receiver and wind up the affairs of the company? Receivership and consequent dissolution of a corporation is at best an exceedingly harsh remedy and will be resorted to by the courts only in extreme cases, and most generally only for the protection of innocent creditors. If a corporation does or threatens to do some *ultra vires* act, the milder remedy of injunction will prevent the evil. If it is doing, or threatening to do, some act that is morally wrong or in violation of the criminal statutes, such as permitting gambling, or racing, or a house of prostitution on its premises, and other similar and somewhat isolated acts, injunction is a complete remedy. *Cope v. District Fair Association*, 99 Ill. 489, 39 Am. Rep. 30; *Sidway v. Missouri Land & Live Stock Co.*, 101 Fed. 481; *Feess v. Mechanics' Bank*, 84 Kan. 828, 115 Pac. 563; *Taylor v. Decatur Mineral & Land Co.*, 112 Fed. 449; *People's Inv. Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738; *Empire Hotel Co. v. Main*, 98 Ga. 176, 25 S. E. 413.

The complaint alleges that Schwartz has "caused said Alaska Junk Company systematically to engage in thievery and robbery as aforesaid; to engage in systematic violation of the criminal laws of the state." We think that is the line. The evil practices must be systematic and habitual and so interwoven as to become a part of the general business. If so, then we are not called upon to determine whether there have been isolated or occasional dishonest or criminal acts, but we are called upon to determine whether the business has been, and will continue to be, carried on in a systematically dishonest manner. The law recognizes that most men do business honestly and fairly, and that

charges to the contrary should, and in the very nature of things must, be clearly and convincingly proven. Here is involved the accumulation of the parties for years; here is a large and prosperous corporation and a perfectly legitimate business which has creditors who are depending on the business of the company being carried on through its corporate officers; here, indeed, much is at stake. We should be, we must be, sure of our ground before we tear down this structure.

It would serve no useful purpose to here undertake to review in detail the testimony. The most damaging portion of it is with reference to the alleged practice of removing from cars, coming in without having previously been weighed, a portion of the contents and then having the cars weighed and making settlement on such weight; and also in removing a part of the contents of cars coming in, which have been previously weighed, and then selling the car to others according to such previous weight. The testimony shows that a very small percentage of the cars came in without having been previously weighed. The respondents deny this charge about unweighed cars with as much vigor as appellant has made it. They seem to admit that, when weighed cars come in, it was and is a practice to remove a part of the material from all or a part of the cars, but they claim that only a certain class of materials, which would not be serviceable to the person to whom the car had been sold, would be removed, and that additional materials, probably of lesser value, would be put on the car to make up the weight of that which had been removed. Whatever may be said against this confessed way of doing business, it is not necessarily dishonest, and the proof that it is dishonest must be convincing. Schwartz, against whom most of the charges are made, started a very small junk business in Seattle some twenty-five or

Apr. 1920]

Opinion Per BRIDGES, J.

thirty years before the forming of this company and has built up an extensive and prosperous business. The business of the present corporation, under his management and control, is a growing and prosperous one. He and his corporation have good and extensive credit. Almost no one who has done business with the company has complained; so far as the testimony shows, its way of doing business has not lost it a customer. As said by the trial judge: "These facts seem rather inconsistent with the idea that the business has been or is conducted systematically as charged." The conflict of testimony is great in many instances and cannot be reconciled. It is largely a question of credibility between witnesses. The trial court found that the appellant had not made a case showing a systematic and habitual dishonesty. We have before us only the spoken words; he had before him those who spoke the words. In a case such as this, he was better able to pass on the credibility of the witnesses than we are. The record shows that the learned and experienced trial court considered the testimony in a most careful, dispassionate and painstaking manner. Giving to the findings of the trial court the consideration to which they are entitled, and after a careful reading of the record, we do not find ourselves convinced that the appellant has made a case showing, as alleged, an habitual and systematic dishonesty in the business dealings of the corporation.

But there are other features of the case which greatly impress us. It cannot seriously be considered that it is necessary to appoint a receiver for the protection of appellant's property rights; the proof shows but little prospect of its loss. If the corporation has been and is likely to be guilty of frauds and dishonesty, whether to a small or to a considerable extent, appellant can complain to a court of equity only because he

is bound to have the appearance of participating in them. But when he asks an extraordinary remedy for such an unusual cause, he must show that he has exhausted all other remedies. We do not think he stands in this position. He has complained only to Schwartz. He has not gone to the employees who have been doing these alleged dishonest acts and tried to stop the evil there; he has not sought the assistance of the strong arm of the criminal law nor complained to those charged with the enforcement of that law; the corporation has a few well known and extensive customers, but he has not gone to them, nor warned them, nor sought their assistance; he has not laid his complaints before the board of directors of the corporation. It is true the doing of these things might injure the business and credit of the company, but certainly not more so than the bringing of this suit and its trial.

For all these reasons, we feel that the judgment must be affirmed. It is so ordered.

HOLCOMB, C. J., TOLMAN, FULLERTON, and MOUNT, JJ., concur.

Apr. 1920]

Statement of Case.

[No. 15539. Department One. April 10, 1920.]

ANN E. DAY, *Respondent*, v. ST. PAUL FIRE & MARINE
INSURANCE COMPANY, *Appellant*.¹

INSURANCE (10)—AGENTS OR BROKER—RELATION TO PARTIES—STATUTES. Under the insurance code, Rem. Code, § 6059-1 *et seq.*, defining an "agent" as the person *appointed* and *authorized* to solicit applications and effect insurance, and a "broker" as a person not appointed who acts or aids in any manner in negotiating contracts of insurance for a party other than himself, one having no appointment and performing only the acts constituting him a broker, could not be an agent of the insurance company, and it was error to refuse to so decide as a matter of law.

SAME (9)—AGENCY—LICENSE TO DO BUSINESS—EFFECT ON POLICY. The fact that an insurance broker had no license to do business as required by Rem. Code, § 6059-1, does not render insurance which he obtained void or voidable, but merely renders him personally liable for the penalty provided by the act.

SAME (189)—ACTIONS ON POLICIES—INSTRUCTIONS—FRAUD. Upon an issue as to fraud and deceit in obtaining an insurance policy, it is not prejudicial error to instruct that the defense must be established by clear and convincing evidence because it is the policy of the law to deal with men on the presumption of their honesty.

SAME (109, 189)—INSTRUCTIONS—ESTOPPEL—KNOWLEDGE OF AGENT. Upon an issue as to the estoppel of an insurance company to set up the defense of deceit in misrepresenting the automobile insured as a new car, it is error to give an instruction warranting the jury in finding an estoppel if the insurance agent subsequently received notice of the age of the car, "or something of that character."

SAME (72, 73)—AVOIDANCE OF POLICY—MISREPRESENTATIONS—INTENT TO DECEIVE. Under Rem. Code, § 6059-34, providing that no representations in the negotiation of insurance shall be deemed material or defeat the policy unless made with intent to deceive, where one has procured insurance on an automobile by false representations known by him to be false, that it was a new 1911 model, when it was a 1910 second-hand car, a presumption arises of the intent to deceive, which is not overcome by the unsupported denial of the insured.

Appeal from a judgment of the superior court for King county, Smith, J., entered January 25, 1919, upon

¹ Reported in 189 Pac. 95.

the verdict of a jury rendered in favor of the plaintiff, in an action on a fire insurance policy. Reversed.

H. T. Granger and S. H. Steele, for appellant.

Flick & Paul, for respondent.

MACKINTOSH, J.—The respondent is suing upon a fire insurance policy which was issued by the appellant on October 25, 1916, in the sum of \$1,000, insuring a Winton automobile, owned by the respondent, which was burned December 15, 1916. The appellant, as a defense to the action, relied upon the fact that the respondent, at the time the insurance was obtained, represented that the automobile was manufactured in the year 1911, and that when purchased by respondent in October, 1911, was new and had cost the respondent \$3,400, whereas, in fact, the automobile was a 1910 model, and when purchased by respondent was a second-hand car and had cost her \$2,000; \$800 paid in cash and \$1,200 in trade; that, had the appellant known that the car was a 1910 model, or a second-hand car, or that it had cost plaintiff only \$2,000, the policy would not have been issued. The testimony shows that insurance was not written on a 1910 model in October, 1916, at the rate charged the respondent. The respondent's husband, through one Fraser, procured the insurance from appellant, the husband telling Fraser that the car was a Winton touring car, manufactured in 1911, and that he had bought it new in that year. Fraser telephoned this information to the agent of the appellant, who consulted the price list of Winton automobiles of 1911 model, and discovered therefrom that such a car would cost \$3,400. Appellant's agent filled out the application with the data given him by Fraser and wrote the policy. The car had been sold by the Winton company previous to its

Apr. 1920]

Opinion Per MACKINTOSH, J.

sale to the respondent and a payment of \$700 or \$800 made, the car then being returned to the Winton company for resale. The respondent was informed of these facts at the time of the purchase. The contract of purchase between respondent and the Winton company described the car as a 1910 model.

The premium on second-hand cars is higher than on new cars, and the insurance law requires schedules of rates to be filed with the insurance commissioner, deviation from which renders the insurance company guilty of a misdemeanor. The respondent's husband knew that the car was second-hand and admitted that he represented it as a new car, but denied that he knew it was a 1910 model. The jury returned a verdict for the respondent in the full amount of the policy, from the judgment upon which verdict the appellant brings this appeal, basing its claim to a reversal on four grounds; first, that a conclusive presumption of implied deceit arose from the testimony and left no question of fact for the jury as to respondent's intent to deceive; second, that Fraser was the agent of the insured and that his statements and acts bind her; and third, that an erroneous instruction was given as to the degree of proof necessary to establish fraud; and fourth, that the appellant was not estopped by the knowledge of its agent, obtained in a conversation with the respondent's husband after the issuance of the policy, to deny that the respondent or Fraser had misrepresented the facts at the time the policy was procured.

The first question we will consider is the instruction given by the court to the jury whereby the jury was empowered to determine, from the facts, as to whether Fraser was the agent of the appellant or the agent of the respondent. In 1911, the legislature passed the insurance code, which is a complete act in itself and

was intended to cover the entire insurance relationship, and by that code the acts constituting one an insurance agent or insurance broker, and the duties and powers of such insurance agent or broker, are defined. Under the act, Rem. Code, § 6059-2, an insurance agent is defined as "a person . . . duly appointed and authorized by an insurance company, to solicit applications for insurance . . . or to solicit applications and effect insurance in the name of the company . . .," and an insurance broker is defined as "any person . . . not being an appointed agent for the company in which insurance . . . is effected, and acts or aids in any manner in negotiating contracts of insurance . . . for a party other than himself." By § 6059-45, insurance agents and brokers must apply for and receive licenses. The act further provides for penalties for one acting as agent or broker without license.

Under the testimony, Fraser was not an agent of the appellant as defined by the statute, but performed all the acts which the statute defines as constituting one a broker, except that he had no license to act in that capacity. It is therefore argued by respondent that Fraser, not being a legally constituted broker under the act, was an agent of the insurance company, under the rule obtaining prior to the passage of the insurance code, which rule was that an insurance agent who places insurance in a company other than his own would be considered the agent of the insurer, so that the insurer would be bound by his acts and statements at the time of issuing the policy, in the same manner as if he was its regularly appointed agent. Cooley's Briefs on Insurance, pages 2491 and 2629; *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877.

Apr. 1920]

Opinion Per MACKINTOSH, J.

The insurance code, however, being a complete act on the subject of insurance, had among its purposes the definite establishment of the status of agents, brokers, etc., and under that act a person not an appointed agent of a company, who acts in any manner in negotiating contracts of insurance for a party other than himself, is a broker, and we have held in *Reynolds v. Pacific Marine Ins. Co.*, 105 Wash. 666, 178 Pac. 811, that:

“Under the insurance code, Rem. Code, § 6059-1 *et seq.*, defining an ‘agent’ as the person *appointed* and *authorized* to solicit applications and effect insurance, and a ‘broker’ as a person not appointed who acts or aids in any manner in negotiating contracts of insurance for a party other than himself, and requiring larger license fees for brokers than for agents, an insurance concern that makes application to the agents of the company for a policy of marine insurance is a broker and acts as agent of the owners of the boat, so that its knowledge would not be imputed to the company.” [Syllabus.]

Fraser had no appointment or authority to solicit applications and effect insurance for the appellant, therefore he could not be its agent. He aided in negotiating the contract of insurance with the appellant, therefore he was a broker. But it is contended that he could not be a broker for the reason that he had failed to take out a license. The acting as a broker without having complied with the requirements of the act does not render the insurance which he had obtained void or voidable, but merely rendered him personally liable for the penalty provided in the act for having assumed the functions of a broker without obtaining the proper license. There is nothing in the testimony to show that appellant or respondent were acquainted with the fact that Fraser was not possessed of a proper license, and he, having been selected by

the respondent, there is no reason why the appellant should be charged with the responsibility for his conduct. Even though we might concede that Fraser was not a broker, yet the respondent should be bound by his acts upon the theory that Fraser was her agent, thus departing from the rule existing before the passage of the insurance code, for the reason that the code expressly provides who shall be agents of the company, and was passed for the purpose of clearly defining the insurance company's duties and liabilities. It was error, therefore, for the court to leave to the jury, as a question of fact for it to determine, the status of Fraser, and it should have been determined, as a matter of law, that Fraser was either the agent or broker representing the respondent, and any knowledge he had or representations he made were the knowledge and representations of the respondent.

Complaint is also made as to the definition given in the instruction of the character of proof necessary to establish fraud and misrepresentation. The court properly told the jury that fraud and deceit must be established by clear and convincing evidence, and, continuing, said that fraud was to be proven by potent and strong evidence, because it is the policy of the law to "deal with men on the basis of their honesty and with the presumption that men are dealing with one another in a spirit of fairness and honesty." Although this instruction may have been in language somewhat different from that ordinarily used, we cannot say that it does not properly measure the degree of proof necessary to establish fraudulent conduct, and was not such an instruction as to call for a reversal of the case.

The appellant argues that the court was also in error in submitting to the jury an instruction touching upon the question of estoppel, as follows:

Apr. 1920]

Opinion Per MACKINTOSH, J.

“There is testimony tending to show, at least on the part of the plaintiff, that there was a conversation between Mr. Day and Mr. Ritter, the local agent of the company. Whether that conversation took place is for you to determine. It is a disputed matter of fact, but it is alleged that a certain conversation was had between the parties at that time. There was at a later time a direct and undisputed meeting between Mr. Day and Mr. Ritter, and there is testimony to indicate that at the time there was a discussion between the parties as to the car, as to its make, as to its model, the age of it, and when it was made, and some other features of it. You will determine the truth as between the parties in that dispute. If at that time you find from the evidence that there was a discussion as to the age of the car, or its model, or something of that character, or if you should further find that Mr. Day did not, in any wise, at that time mislead the insurance company, or should you find that the matter of the age of the car was discussed and left in doubt, then it is the law that the company is estopped from asserting the claim that it is injured, or was injured by a misrepresentation made by Mr. Fraser at an earlier period of similar facts, if you find such to have been made regarding the age of the car.”

This instruction was given regarding a conversation that respondent's husband had with the appellant's agent after the policy had been written, in regard to the discrepancy in the engine number, to the effect that:

“When the policy came I noticed some discrepancy in the number of the engine. When I first gave the number of the engine I made a note of it on some slip. I looked the policy over and looked at the number and noticed that it was not the number I had given Mr. Fraser. . . . I called Mr. Ritter on the telephone and told him that I had received the policy and the number on the engine was wrong, and he said to bring it down there and they would change it. I went down immediately and saw Mr. Ritter and told him about it, and he said it was all right and told the young

lady to change it. Mr. Ritter said they held that policy up about two weeks. They had to send it down to San Francisco. Ritter asked me when I bought that car, and I told him in 1911. That is all I said to him. He handed me back this with the correction on it. The young lady took the rubber and erased it and put it back on the machine and put the number on it, the number I handed him."

This conversation could only have left in doubt the question as to the age of the car. The appellant's agent was not empowered to cancel the policy, which was then in effect, nor did he do or say anything which damaged the respondent or put her in a worse position. The appellant's agent had no reason then to believe that the information given him by Fraser was false. There was, in fact, nothing then known which would create a suspicion as to the matter. The company can hardly be estopped by the failure of its agent to leave his office to look at the car when there was no stronger reason calling for his doing so than is shown in the record.

That instruction does not refer to the question as to whether the car was purchased new, which was one of the material matters in issue, and if the instruction should have been given at all, it was error to omit that feature. Furthermore, the reference to "something of that character" is too indefinite and uncertain to be the foundation for an estoppel, and, in fact, a discussion as to the age, or model of the car, "or something of that character," does not amount to an assertion of a fact which would tend to have misled the respondent so that appellant should be estopped from a denial thereof.

The instruction was further incorrect in that the appellant is not estopped from asserting a claim that it was injured by the misrepresentations previously made by Fraser, representing the respondent, and who pro-

Apr. 1920]

Opinion Per MACKINTOSH, J.

cured the issuance of the policy, by reason of the fact that Mr. Day subsequently did not do anything to mislead the company. The act of the respondent, through Fraser, was a positive one, and was of such a nature as to invalidate the policy, and the fact that subsequently the respondent, through her husband, did nothing further to mislead the company, would not estop the company from claiming the illegality of Fraser's original act.

We come now to the most important question raised in the case, namely, the effect of the representations and statements made in regard to the model, age and newness of the car, which are claimed by the appellant to have been false and fraudulent, and which are conceded by the respondent to have been misstatements. It is contended by the appellant that these statements having been made to it by Fraser from the basis of information furnished him by respondent's husband, and having been made by the husband with knowledge that they were untrue, or, at least, inaccurate, they, therefore, make void the policy, and that it was error to submit to the jury the question of whether those representations were made with intent to deceive. Section 6059-34, Rem. Code, reads:

"No oral or written misrepresentations or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive. . . ."

It is argued by respondent, relying on this section, that, although these representations were made with knowledge of their falsity, it was a question of fact for the jury to determine as to whether they were made with intent to deceive. The testimony shows that the respondent's husband knew that the car was

a 1910 and not a 1911 model; knew, also, that it had been used prior to his wife's purchase of it, and that the car was not, as he represented it, a new car at the time of such purchase. To establish the lack of intent to deceive by making these fraudulent representations, he testified that he had no such intent in making them, and that he considered that a car used as little as had been the car at the time of the purchase was a new car, or, at least, one as good as a new car, and that, although the contract of purchase, with which he was familiar, designated the car as a 1910 model, he represented it as a 1911 model, either because he did not consider there was any difference, or that he had forgotten the actual date of its manufacture.

We have gone far in maintaining, as a question of fact, the intent accompanying false and fraudulent representations, and have allowed to be submitted to the jury for its determination the question of intent where there has been very slight proof that the applicant for insurance might have had no idea of procuring the policy by misrepresentations, but the rule should not be so far extended as to include a case such as this and allow insurance to be enforced which was not procurable had the truth been told, where it was issued relying upon fraudulent statements and the proof of honest intent consists merely in the applicant's bare affirmation that his intent was honest. The proof of the making of false and fraudulent representations raises a presumption of dishonest motive, which must be overcome by evidence establishing an honest motive. It is true that motive and intent are mental states, and that evidence of the mental state of an applicant is sometimes hard to prove where there are no facts or circumstances to establish it other than the applicant's own declaration. However, honesty and fair dealing would seem to require that, in

Apr. 1920]

Opinion Per MACKINTOSH, J.

order to overcome the presumption, there must be some testimony more concrete than was here given when an applicant admits, as he does here, that the representations were made with the knowledge that they were untrue. It may be that representations made at a time when the applicant may have forgotten the facts, or made through carelessness or mistake, or where the representative of the insurance company had prior knowledge of the facts which were contrary to the representations made by the applicant, makemissible to the jury the question of whether the applicant acted with intent to deceive or not. In this case the respondent admits that the statements were "material enough to avoid the policy if there was an intent to deceive," and they having been made with knowledge of their falsity, a presumption arises of the intent to deceive, which presumption is not overcome by the unsupported declaration of the applicant that no such intent existed in his mind at the time.

The appellant relies largely upon the case of *Quinn v. Mutual Life Ins. Co.*, 91 Wash. 543, 158 Pac. 82, where representations were made in an application for life insurance that the applicant had not been suffering from any physical disability and had consulted no physicians within a given time prior to the application. These representations were false, and the lower court, trying the case without a jury, found that they were made with no intent to deceive. This court, upon appeal, reviewed the facts and found that the representations could not have been made without an intent to deceive, and therefore cancelled the policy. The *Quinn* case, even though it had not thereafter been questioned by this court, would hardly support the contention that appellant makes, that all material false representations made by an applicant would relieve an insurance company, for that would nullify the provision that such

representations should not have that effect if they were not made with intent to deceive. The result in the *Quinn* case was correct for the reason that it was a case tried without a jury, and the court determined the fact to be that there was an intent to deceive at the time the representations were made.

The respondent bases her claim that the instruction given by the court was correct largely upon the case of *Brigham v. Mutual Life Ins. Co.*, 95 Wash. 196, 163 Pac. 380, where the applicant had made representations similar to those in the *Quinn* case, and this court held that the question of whether those representations had been made with intent to deceive was a question of fact which should have been submitted to the jury. The decision in that case is correct for the reason that, although false representations were made, the agent of the company, to whom they were made, had prior knowledge of the fact, he having been the physician in attendance upon the applicant, that the representations were false, and therefore there was a question as to whether the company was deceived. In that case the court said:

“The difference in the facts makes the difference in the law. We did not intend to hold in the *Quinn* case that misrepresentation alone was sufficient, as that would be flying into the teeth of the statute, which was referred to in the opinion followed by this observation: ‘In view of this statute, the only fact to be determined is whether or not the representations made by the applicant were made, as the court found, without intent to deceive.’ This language can mean nothing else than that the intent to deceive must be found as a fact.”

The *Brigham* case is to be distinguished from the case at bar on the ground that, in the case at bar, there is no evidence, other than the applicant's denial of fraudulent intent, to overcome the presumption which arises from the making of the false representations

Apr. 1920]

Opinion Per MACKINTOSH, J.

with knowledge of their falsity. We have held that testimony given by a witness that he had looked but did not see a certain object, when he must have seen it had he looked, is not evidence of the fact to which he testifies, and so here, we hold that a bare statement by a person that he had no intent to deceive is not evidence of that lack of intent where the original statements made by him were made with knowledge of their falsity. *Woods v. Insurance Company of Pennsylvania*, 82 Wash. 563, 144 Pac. 650.

The case of *Goertz v. Continental Life Ins. & Inv. Co.*, 95 Wash. 358, 163 Pac. 938, submitted to the jury the question of the applicant's intent where the testimony showed that the applicant had stated that he was not suffering from any disease and had never consulted a physician, and the testimony showed that he was examined and found in good health in December and in July prior to his application; that he was examined by the company's doctor at the time of his application and found to be in perfect condition, but had died of tuberculosis some nine months after the application, although there was testimony of another physician that, in the April preceding his application, he had been examined and found to have been suffering from tuberculosis. Under this conflicting evidence it was proper to submit the question to the jury, this court saying:

"The case should have been submitted to the jury under proper instructions upon the questions of whether the representations and warranties complained of were in fact false when made, were known by the insured to be such at the time, and were made with intent to deceive."

In the case at bar, it is indisputable that the representations were false and known to be false when made.

In *Askey v. New York Life Ins. Co.*, 102 Wash. 27, 172 Pac. 887, L. R. A. 1918F 267, the applicant answered the question that he was not suffering from any disease of the lungs, and in 1911 that he had had an attack of pneumonia, from which he had recovered, and that he had consulted no physician for any other ailment. At the time the application was made in 1915, the examining physician of the insurance company made a complete examination and found no indications of tubercular trouble. The doctor who had treated the applicant in 1911 made a certificate that he had at that time treated him for tuberculosis. Upon this evidence the court properly submitted to the jury the question as to whether the false representations made in the application were made with intent to deceive, this court saying:

"If in truth the insured had tuberculosis, there is no evidence showing that he had knowledge of the fact, other than the natural inference that one really suffering from such a disease would probably know it. Dr. Klamke was not called as a witness, and there is no proof that he ever informed his patient that he was suffering with tuberculosis. The death certificate filed by the respondent was not proof of any disease suffered by the insured four or five years prior to death. It constituted an admission by the respondent that the statement in the death certificate was probably true. Such statement constituted *prima facie* evidence which was subject to refutation, and, even allowing it full force to establish the physical condition of the insured, it was not proof of the insured's intent to deceive the company."

The case at bar on its facts is distinguished from the *Askey* case.

Apr. 1920]

Syllabus.

Under the assignment of error last considered, it was improper for the court to have submitted the case to the jury, and the appellant's motion for judgment notwithstanding the verdict should have been granted.

Judgment reversed.

HOLCOMB, C. J., MAIN, MITCHELL, and PARKER, JJ.,
concur.

[No. 15790. Department One. April 10, 1920.]

THE STATE OF WASHINGTON, *on the Relation of Rothwell
& Company, Incorporated, Plaintiff*, v. THE
SUPERIOR COURT FOR KING COUNTY,
MITCHELL GILLIAM, *Judge*,
Defendant.¹

APPEARANCE (5)—SPECIAL APPEARANCE—MOTION TO QUASH SERVICE OF SUMMONS—JURISDICTION ACQUIRED. A special appearance to quash service of summons for want of jurisdiction of the person of the defendant, raising questions of fact as to whether defendant was doing business in this state or had an agent herein upon whom process could be served, submits to the jurisdiction of the court for the purpose of deciding all questions of law and fact necessary to dispose of the motion.

DEPOSITIONS (1)—WHEN MAY BE TAKEN—SPECIAL PROCEEDINGS. Upon a special appearance to quash service of summons, raising questions of fact as to whether defendant was doing business in this state or had an agent herein upon whom service of summons could be made, depositions may be taken in opposition to the motion, under Rem. Code, §§ 1231, 1232, authorizing the same in any pending action, suit or proceeding at any time after service of summons, under the liberal construction of the code required by Rem. Code, § 144.

SAME (5)—TIME OF TAKING. Rem. Code, § 1232, authorizing the taking of depositions at any time after service of summons, means at any time after the court has acquired jurisdiction of the particular proceeding by means equal in its legal effect to service of summons.

¹ Reported in 189 Pac. 556.

Application filed in the supreme court March 5, 1920, for a writ of prohibition to prevent the superior court for King county, Gilliam, J., from issuing a commission to take the depositions of certain witnesses. Denied.

Geo. H. Rummens and Hastings & Rubens, for plaintiff.

Peters & Powell, for defendant.

PARKER, J.—This is an original proceeding in this court wherein the relator seeks a writ of prohibition to prevent the superior court for King county from issuing a commission to take the depositions of certain witnesses residing in the state of New York, to be read in evidence upon the hearing of relator's motion to quash a service of summons purported to have been made upon it personally in King county, which summons was issued in an action commenced against it by the filing of a complaint in the superior court for that county.

On September 5, 1919, Cook Swan Company, a corporation, commenced an action in the superior court for King county by the filing of its complaint therein, seeking recovery of a personal money judgment against relator rested upon a claim of damages alleged to have resulted from a breach of a contract on the part of relator. Thereafter, on the same day, a summons was duly issued in that action, which was then placed for service in the hands of a person duly authorized to make service thereof, who, on the same day, made return of service thereof as follows:

"On the 5th day of September, 1919, I duly served the within summons upon Rothwell and Company, Inc., a corporation, it being the defendant named in said summons, by delivering to and leaving with T. G.

Apr. 1920]

Opinion Per PARKER, J.

Stewart, managing agent of defendant, Rothwell and Company, Inc., a corporation, personally in said King county, a copy of said summons, together with a copy of the complaint in said action."

Relator is a corporation organized and existing under the laws of the state of West Virginia. The action was commenced, and the service of summons made, as evidenced by the return thereof above noticed, upon the theory that the relator was doing business in this state and could, therefore, be sued therein, and that Stewart was its duly authorized agent upon whom service of summons as such could be lawfully made as against relator. Within twenty days after the purported service of summons, relator caused to be entered in the action its special appearance for the sole purpose of moving to quash the service of summons made upon Stewart as its agent; and made its motion accordingly, rested upon the grounds as follows:

"That said T. G. Stewart . . . is not now and never has been an agent, cashier, secretary, officer or other representative of the defendant, Rothwell and Company, Inc., a corporation of the state of West Virginia; that said T. G. Stewart was not on September 5, 1919, or at any time, either prior to or subsequent to the time of said alleged attempted and pretended service, authorized to receive service of any process, summons, pleadings or other papers as agent of the defendant, . . .

"That said defendant, Rothwell and Company, Inc., . . . is a citizen and resident of the state of West Virginia and was not and is not now a corporation of the state of Washington or organized, doing or transacting business within the state of Washington, and was not, at the time of the attempted service, on the to wit: 5th day of September, 1919, and is not now a resident of the state of Washington, nor the county of King in said state; that it had not, at the time of said attempted service, any office or principal place of

business within King county or the state of Washington; that it did not, at the time of said attempted service, and does not now, maintain any office or place of business within King county or the state of Washington, and that it did not, at the time of said attempted and alleged service, and does not now maintain any agent within King county or the state of Washington, and never has maintained any office or any agent or agents or places of business within King county or the state of Washington."

Counsel for relator filed in the case with its motion to quash, three affidavits in support of the facts alleged in its motion as grounds for quashing the service of summons, thus presenting to the superior court the questions of fact: (1) as to whether relator was doing business in the state of Washington, and (2) as to whether or not Stewart was its agent upon whom service of the summons could be made as against it. Thereafter, upon due notice to counsel for relator, counsel for Cook Swan Company applied to the superior court for a commission to take the depositions of certain witnesses residing in New York, to be read in evidence upon the hearing of relator's motion to quash the service of summons, and asked that a final hearing upon the motion to quash be continued until the depositions of such witnesses could be taken. Counsel for relator then objected to the issuance of the commission to take the depositions as asked for, insisting that the superior court had no jurisdiction or power to issue a commission to take depositions to aid in the determination of the issues of fact tendered in relator's motion to quash, or upon any other branch of the case, until it should be determined that the court had acquired jurisdiction over the relator by proper service of summons upon it within the territorial jurisdiction of the superior court. The judge of the superior court then announced his intention to order

Apr. 1920]

Opinion Per PARKER, J.

the issuance of a commission to take depositions as asked for by counsel for Cook Swan Company. This announcement of the judge of the superior court was promptly followed by an application to this court for a writ of prohibition in this proceeding, since which time the matter has been held in *status quo* by appropriate order of this court.

It is plain from the record before us that the application for the issuance of the commission to take the depositions of witnesses in New York, and the contemplated ordering of the issuance of such commission by the superior court, look only to the taking of depositions of witnesses in so far as their testimony may be material and relevant to the issues of fact tendered by relator's motion to quash the service of summons, and that the superior court has no intention of issuing a commission to take depositions touching the merits of the cause of action pleaded in the complaint of Cook Swan Company.

Care must be exercised, as we proceed, to avoid the confusion which would result from a failure to properly appreciate the difference between the question of the jurisdiction of the superior court over the person of relator in the main action for the purpose of its disposition upon the merits, and the question of the jurisdiction of the superior court over the person of relator for the purpose of disposing of its motion to quash the service of summons purported to have been made upon it and evidenced as the statute directs. Relator's special appearance for the sole purpose of making its motion to quash the service of summons, of course, prevents such appearance from having the effect of relator's waiving service of summons or of submitting itself to the jurisdiction of the court for the purpose of enabling the court to dispose of the main case upon the merits; but manifestly all ques-

tions, both of *law and fact*, which are necessary to be determined by the court in disposing of relator's motion to quash the service of summons are, by the very making of that motion, voluntarily submitted by relator to the court for decision. It is to us unthinkable that relator could voluntarily appear in the action, though he may ever so plainly tell us, in his motion to quash the service of summons, that he appears solely for the purpose of that motion, tender issues of fact therein which must necessarily be decided in disposing of the motion, and, at the same time, be heard to argue that the court is not permitted to hear evidence offered in opposition to such motion, as well as evidence in support of it, to aid in deciding the issues of fact tendered thereby. It may be that counsel for relator do not consider that their argument goes to this extent, but their repeated insistence in their brief, and upon oral argument, that relator's appearance is special and in no way waives service of summons in the action, or in any respect submits relator's person to the jurisdiction of the court, seems to suggest that counsel do not regard relator's appearance such as to even enable the court to render such a decision upon the motion to quash the service of the summons as will be conclusive upon relator. We are of the opinion that, by making the motion to quash the service of summons, relator did submit itself to the jurisdiction of the superior court for the purpose of disposing of that motion, and for the purpose of the court deciding all questions, both of *law and fact*, necessary to be decided in properly disposing of it.

Is the superior court authorized to cause depositions of witnesses residing in another state to be taken, to the end that their testimony so taken may be read in evidence upon the trial of the issues of fact tendered and presented to the court for decision by a motion to

Apr. 1920]

Opinion Per PARKER, J.

quash the service of a summons in an action at law? This is the real question here to be decided. The following sections of Remington's Code, relating to the taking of depositions, we think answers this question in the affirmative:

"Sec. 1231. The testimony of a witness may be taken by deposition, to be read in evidence in an *action, suit, or proceeding commenced and pending in any court in this state*, in the following cases:

"(4). When the witness resides out of the state."

"Sec. 1232. Either party may commence taking testimony by depositions at *any time after service of summons upon the defendants*."

We italicize the words to be particularly noticed. Sections 1239 and 1240 provide for the issuance of commissions to take depositions of witnesses outside of this state, which sections we notice only for the purpose of showing that the superior court has express statutory authority for issuing such commissions. Counsel for relator rely particularly upon the words "any time after the service of summons," found in § 1232, above quoted. To read these words literally as a restriction upon the time when a party may commence taking depositions in an "action, suit, or proceeding," would be to hold them as meaning that, in actions, suits or proceedings in which the court should acquire jurisdiction over the controversy and the persons of the parties thereto without the service of summons, but by voluntary appearance, no depositions could ever be taken to aid the court in deciding the questions of fact presented.

We are of the opinion that the words "any time after service of summons" mean any time after the court has acquired jurisdiction over the particular action, suit or proceeding, and the persons of the parties thereto, by any means which is equal, in its legal

effect, to the service of a summons, and that either party may commence the taking of depositions upon the issues of fact to be tried in such "action, suit, or proceeding" at any time after jurisdiction has been so acquired by the court. We have already seen that, the superior court has acquired jurisdiction over the question of the legal sufficiency of the purported service of summons and of the person of relator, in so far as the disposition of its motion to quash and all questions of law and fact necessarily involved therein is concerned.

Is this an "action, suit, or proceeding commenced and pending" in the superior court for King county? We are not suggesting this question with reference to the main action, but solely with reference to relator's motion to quash the service of summons and the issues thereby voluntarily tendered by it for decision. We are reminded by counsel for relator that the procuring of testimony by the taking of depositions in pure law actions was unknown to the common law. They then argue that statutes providing for the taking of depositions, being in derogation of that rule, are to be strictly construed; and that so construing § 1231, it must be held to mean that depositions can be taken only for the purpose of producing testimony to be read upon the trial of a law action upon its merits. We cannot agree that § 1231 calls for such a strict construction. It seems to us that the words "action, suit, or other proceeding commenced and pending" mean any proceeding commenced and pending in court which in its proper disposition calls for the decision of questions of fact. There would seem to have been no purpose in using the three words "action," "suit," and "proceeding," unless there was a legislative intent to embrace something more than a plain action at law. The decisions of the court touching similar

Apr. 1920]

Opinion Per PARKER, J.

questions seem to be out of harmony, but we apprehend such want of harmony arises largely from the difference in the statutes under which such questions arose. It hardly needs argument to demonstrate that this statute is purely a remedial one. That of itself suggests a liberal construction, but we have something more than that as our guide in the very act of the legislature wherein is found §§ 1231 and 1232, above quoted from, for in § 144, Rem. Code, we read:

“The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction.”

All three of these sections were embodied in the civil procedure act of 1881, found in the code of 1881, being §§ 409, 410, and 758 thereof, which civil procedure act is embodied in §§ 1 to 763, inclusive, of that code. (See, also, Laws of 1891, p. 40). Nothing, it seems, could render more plain our duty to give to these sections a liberal construction. We think the motion to quash and the disposition of the issues thereby presented constitute a proceeding within the meaning of § 1231, above quoted. Several cases are called to our attention wherein it is held that trial courts have no power to issue commissions to take depositions prior to the acquiring of jurisdiction over the persons of the parties to the controversy, but with one possible exception, such decisions deal with the question of taking depositions touching the merits of the main action before the acquiring of jurisdiction over the person of the defendant for the purpose of determining the merits of the main action. That is not this case. The only case coming to our attention which seems to hold to the contrary of the conclusion we here reach is that of *Woods v. Dickinson*, decided by the supreme court of the District of Columbia in 1889, 18 App. D. C. (7 Mackey) 301. The situation there

involved may not be wholly distinguishable in principle from that here involved, though there is room for so arguing. If our conclusion here reached be, in fact, inconsistent with the views of that learned court, we nevertheless feel constrained to adhere to it, in view of the language of our deposition statute and the liberal construction thereof we are required to place upon it by the express terms of another section of the same legislative act.

Some contention is made that prohibition is not a proper or available remedy for relator, in that its remedy by appeal is adequate. There is fair room for argument on both sides of this question, which we do not find it necessary to here decide, being clearly of the opinion that in no event is relator entitled to the relief prayed for.

The writ is denied.

TOLMAN, MITCHELL, and FULLERTON, JJ., concur.

HOLCOMB, C. J., concurs in the result.

Apr. 1920]

Statement of Case.

[No. 15602. Department Two. April 22, 1920.]

CHARLES H. BEBB *et al.*, Respondents, v. F. M. JORDAN,
Appellant.¹

MUNICIPAL CORPORATIONS (313, 315)—POLICE POWER—REGULATION OF BUILDINGS—HEALTH AND FIRE PROTECTION—ORDINANCES—POWERS OF CITY. Rem. Code, § 7507, providing that cities of the first class may regulate the manner in which buildings shall be constructed, authorizes a city to provide by ordinance for light and air area and open spaces at the rear of apartment houses.

SAME (327)—REGULATIONS—REASONABLENESS. It is a reasonable exercise of legislative power to require that an apartment house in a populous city have a court of a prescribed area for light and air and an open space in the rear.

CONTRACTS (134) — PERFORMANCE — SUFFICIENCY — ARCHITECT'S PLANS VIOLATING BUILDING ORDINANCE. An architect employed to make plans for an apartment house of a given style and dimensions cannot recover on *quantum meruit* for plans for a building which would be a violation of the building ordinances, where the architect had notice of the location; and it is immaterial that the contract was for a building similar to another which, unknown to the owner, violated the ordinances.

WORK AND LABOR (14)—PART PERFORMANCE—COMPLETION PREVENTED BY DEFENDANT. On *quantum meruit* for the value of services of an architect in drawing plans for a building, the owner, after stopping the work before the plans were completed, cannot be heard to say that the plans when completed would have violated the building ordinances of the city; since such fact was rendered uncertain by defendant's acts (Bridges, J., dissenting).

Cross-appeals from a judgment of the superior court for King county, Hall, J., entered February 14, 1919, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed on defendant's appeal.

George E. de Steiguer and Peters & Powell, for appellant.

Kerr & McCord (Wm. Z. Kerr, of counsel), for respondents.

¹ Reported in 189 Pac. 553.

FULLERTON, J.—In this action the plaintiffs, Bebb & Gould, sued to recover from the defendant, Jordan, some \$10,058.16, for services rendered as architects in designing and drawing plans and specifications for an apartment building which the defendant contemplated constructing. After issue joined, the action was tried by the court sitting without a jury, and a judgment was awarded the plaintiffs in the sum of \$4,071.80. From this judgment, both parties appeal.

The record discloses that, sometime in October, 1916, the defendant, being then the owner of a vacant lot in the city of Seattle, conceived the idea of improving the lot by erecting thereon an apartment building. There was then a six-story apartment building upon a nearby lot owned by one W. D. Perkins and known as the Sheridan Apartments. The defendant examined the building and was given to understand that it cost less than \$100,000. He then went to the plaintiffs' offices and, meeting Mr. Bebb of the plaintiffs' firm, told him he thought of improving his lot, and what he had learned of the Perkins building, requesting Bebb to examine the building and ascertain what a similar building would cost, saying to him further, that if the cost of a similar building, including architect's fees, would not exceed \$100,000, he would erect such a building upon his lot. Mr. Bebb procured the plans of the building, consulted with a contractor who had bid on its construction, and ascertaining to his own satisfaction that the building could be constructed within the cost as limited, so informed the defendant. The defendant thereupon told him to prepare the plans and specifications for the building. The work was entered upon, but before the plans were completed the defendant conceived the idea of increasing the building from a six-story structure to one of eight stories. He went to the plaintiffs' offices and, finding that Mr.

Apr. 1920]

Opinion Per FULLERTON, J.

Bebb was away on a business trip in the east, took the question up with the person in charge of the offices. He was told by this person that the addition of two stories would add to the cost of the building approximately the sum of \$30,000. He thereupon directed plans to be drawn for a building of eight stories instead of six. This change required the strengthening of the supporting parts of the frame work of the lower stories to take care of the additional weight, and consequently the preparation of practically new plans and specifications. While the general plan of the building would remain the same, the dimensions of the rooms would not, as the increased size of the supporting parts would take up more of the available space. New plans were, in consequence, prepared, and when completed bids were taken for the construction of the building, the lowest bid received was in excess of the estimated costs by approximately \$40,000. The defendant thereupon abandoned the enterprise, and refused to pay for the architects' services. This action was then brought, with the result before stated.

The defendant interposed a number of defenses, the principal defense being that the plans prepared were useless to him, as a building erected on the lot in question in accordance therewith would be a violation of the building ordinances of the city of Seattle. These ordinances require, for a building of the height of this one, a court area for light and air of sixteen hundred and eighty square feet, whereas the plans provide for an area of twelve hundred and eighty-eight feet only. The ordinances also require, of a building erected upon a lot in the situation of this lot, yard room on the alley thirteen feet in depth, whereas these plans provide for a building covering the entire lot, leaving no space as yard room. It was testified, apparently without contradiction, that to make the plans comply with

the first of these conditions would necessitate the cutting out of an apartment of two rooms on each of the floors, and that to comply with the second would require a redrawing of the entire plans.

It cannot be successfully denied, we think, that defects of this sort are defects of substance, and not mere immaterial variances, and that, if the city has power to enact such ordinances, and the particular ordinance is not an arbitrary exercise of the power, the defendant could not lawfully erect a building, in accordance with the plans submitted, on the lot for which the building was designed. The plaintiffs, however, question both the power of the city to enact the ordinance and its reasonableness. The first of these questions does not require discussion at length. By the express provisions of the statute (Rem. Code, § 7507), municipalities of the first class are given power "to regulate the manner in which stone, brick, and other buildings, . . . shall be constructed and maintained." As the city of Seattle is of the designated class, and as the ordinance in question is regulative in its nature, there is no question of the city's power to enact it, unless the legislature which delegated the power to the city is itself without such power. But regulations as to the height and character of buildings which may be erected in populous communities are common, and if aimed at promoting the public health, safety or welfare, and tend reasonably so to do, are open to no constitutional objection on the question of power to enact such ordinances.

Whether a particular ordinance is arbitrary or unreasonable is usually a more serious question. In this instance we cannot conclude that the ordinance is so. In *Olympia v. Mann*, 1 Wash. 389, 25 Pac. 337, 12 L. R. A. 150, we held an ordinance establishing fire limits and prohibiting the construction of wooden buildings

Apr. 1920]

Opinion Per FULLERTON, J.

therein a reasonable exercise of the power; and to the same effect is *Seattle v. Hinckley*, 40 Wash. 468, 82 Pac. 747, 2 L. R. A. (N. S.) 398, where we held valid an ordinance requiring the construction on certain buildings of fire escapes of a designated kind. In *Eubank v. Richmond*, 110 Va. 749, 67 S. E. 376, a statute authorizing cities and towns to establish building lines adjoining a city park so that buildings shall be at least a certain distance from the street line was held to be a valid exercise of the police power. In *Building Commission of the City of Detroit v. Kunin*, 181 Mich. 604, 148 N. W. 207, Ann. Cas. 1916C 959, a provision in the building ordinances of the city named, that in the rear of every tenement house, subsequently erected, there shall be a yard not less than fifteen feet in depth extending the entire width of lot, open "from the ground to the sky," was held to be reasonable and a valid exercise of the police power. The principle of these cases sustain the ordinance here involved. If it be a legitimate exercise of legislative power to prescribe fire limits and restrict the character of buildings that may be erected therein, or to require buildings to be equipped with fire escapes of a certain design, or to require buildings to comply with a prescribed street line facing a public park, or to require an open space in the rear of a tenement house, then clearly it is a reasonable exercise of the same power to require that a building designed for apartment use have a court of a prescribed area for light and air and an open space in its rear. The purpose in each instance is the same, namely, the protection of the lives, health and comfort of the people of the city.

The plans and specifications being thus unsuitable for a building on the described lot, can the architects recover on *quantum meruit* for the reasonable value of their services in preparing them? Unquestionably an

architect, when employed generally to draw plans and specifications for a building of a given style and dimensions, may recover for the reasonable value of his services on a compliance with the terms of the employment, even though the building planned be one which the employer cannot erect at the place it is his purpose to erect it. But the rule is otherwise where the lot or the location of the lot on which the building is intended to be erected is made known to him. In such a case, he is bound to know the building restrictions of the particular place and draw the plans and specifications accordingly, else forfeit his right of recovery for his services. This on the familiar principle that, in all such contracts of employment, there is an implied condition that the work when completed shall be suitable and proper for the purposes intended. An architect is an expert in his particular line of work. He so holds himself out, and is employed because he is such. He is not only bound to know the character of materials necessary to the construction of a safe and durable building of the design required, but is bound to know also the building restrictions imposed by the law of the place where he is informed the building is to be erected.

In *Straus v. Buchman*, 96 App. Div. 270, 89 N. Y. Supp. 226, the plaintiff purchased a partially completed building and employed the defendants as architects to superintend and supervise the remainder of the work to be performed thereon. At the time of the purchase, a change in the plans of the building, of which the defendants were fully advised, was agreed upon between the plaintiff and his vendor, the change requiring a new support for certain tail beams. These the architects permitted to be rested on studding partitions, contrary to the requirements of a statute applicable to buildings at that place. The building when

Apr. 1920]

Opinion Per FULLERTON, J.

completed proved to be defective, and the plaintiff sued the defendants in damages. Holding the defendants liable, the court said:

"The placing of these timbers, and the manner in which they were secured, was not only a serious defect, but a direct violation of the statute in force at that time relating to the construction of buildings in the city of New York (section 476, c. 275, p. 547, Laws 1892), which provided that 'in no case shall either end of a beam or beams rest on stud partitions.' It was the duty of the defendants, under their contract with plaintiff, not only to see that the beams were properly placed, but especially to see that the placing of them conformed to the requirements of the statute. This they failed to do."

In *Nave v. McGrane*, 19 Idaho 111, 113 Pac. 82, the plaintiff, an architect, sued to recover for his services in drawing plans for a building which the defendant contemplated constructing. At the trial, it was shown that the building, as designed by the architect, violated the building ordinances of the city where the building was intended to be erected. It was held that the architect could not recover, the court saying:

"So far as an architect is concerned, there is always an implied contract that the work shall be suitable and capable of being used for the purpose for which it is prepared. Apart from questions of public policy, this principle would prevent him from recovering upon plans and specifications prepared in violation of law, unless he was directed to so prepare them by the owner."

See, also, *Progress Amusement Co. v. Baker*, 106 Wash. 64, 179 Pac. 81; *Hart v. City Theatres Co.*, 215 N. Y. 322, 109 N. E. 497; *Burger v. Roelsch*, 77 Hun 44, 28 N. Y. Supp. 460; 5 C. J. 260.

The trial court in its findings, while recognizing that the plans and specifications as drawn violated the building ordinances of the city of Seattle, held the archi-

tect excused because the defendant desired a building in conformity with the Sheridan Apartments, and that this building violated the ordinances in the same manner that the plans submitted violated them. But we think it plain that this fact would not excuse the architects. The rule might be otherwise had the defendant known the fact and directed plans to be drawn in accordance therewith in spite of such knowledge. But the evidence makes it clear that he had no such knowledge, and that a mere inspection of the building and the ordinances would not disclose the fact to a person not skilled in building construction. On the other hand, the plaintiffs did know of it, or ought to have known of it, and it was negligence on their part not to so inform the defendant before entering upon the work of drawing the plans. It follows there can be no recovery for the plans of the eight-story building.

As to the services performed on the plans for the six-story building, we think the plaintiffs are entitled to recover their reasonable value. The defendant employed the plaintiffs to prepare them and stopped the work thereon before they were completed. By these acts, unless a sufficient reason intervened, he obligated himself to pay such sum as the services performed thereon were reasonably worth. The defendant seeks to escape liability by showing that the plans, as far as they had been prepared, contemplated a building which could not be constructed within the limit of cost agreed upon and showed, as do the plans for the building of eight stories, a violation of the city ordinances. As to the first of these objections, the evidence was contradictory and, to our minds, supports the one theory as well as the other. But we think the true answer is that the plans were incomplete when the defendant stopped work upon them, and that he cannot now be heard to say that, when completed, they would have

Apr. 1920]

Dissenting Opinion Per BRIDGES, J.

violated the contract as to cost, or the city ordinances, or would have been otherwise defective. These are matters that cannot now be certainly known, and the reason they are in this uncertain condition is because of the defendant's acts, not because of the acts of the plaintiffs.

The plaintiff Bebb testified that the reasonable value of the services rendered by his office on these plans was \$3,100. In this he has the support of other architects, while there is no evidence to the contrary. We think, therefore, that the sum named should be the measure of the plaintiffs' recovery.

The judgment entered is therefore reversed, and the cause remanded with instructions to enter a judgment in favor of the plaintiffs for \$3,100.

HOLCOMB, C. J., TOLMAN, and MOUNT, JJ., concur.

BRIDGES, J. (dissenting).—I heartily concur in that part of the foregoing opinion which denies relief to respondents, but I cannot agree that they are entitled to any judgment in their favor. It is plain, to my mind, that the original agreement for plans and specifications for the six-story building, afterwards became merged in the contract for the eight-story structure. I cannot agree that there were two contracts and that recovery may be had on one and denied on the other. I am therefore of the view that the judgment should be reversed and the case remanded with instructions to dismiss.

[No. 15640. Department Two. April 22, 1920.]

SEGRID HENRICKSON, *Respondent*, v. C. J. SMITH *et al.*,
Appellants.¹

HUSBAND AND WIFE (80, 84)—COMMUNITY PROPERTY—DEBTS CONTRACTED BY HUSBAND—ORDINARY BUSINESS—PRESUMPTIONS—WRONGFUL ACTS. A client's action against an attorney and his wife to recover of the community a sum collected by the attorney and wrongfully withheld, is not for a tort for which the attorney alone would be liable; the presumption being that the ordinary business of the husband was community business and the complaint need not negative the exceptions to the rule.

SAME (88) — COMMUNITY PROPERTY — ACTIONS — PARTIES. In a client's action against an attorney and his wife, seeking a judgment against the community for moneys collected and wrongfully withheld, the wife is a proper party defendant.

SET-OFF AND COUNTERCLAIM (12)—SUBJECT MATTER—CAUSES OF ACTION ON OTHER AND DISTINCT TRANSACTION. In a client's action against an attorney to recover money collected and wrongfully withheld, a counterclaim for libel in making complaint against the attorney to the grievance committee of the bar association does not arise out of the transactions set forth in the complaint, within the requirement of Rem. Code, § 265.

TRIAL (63)—TAKING CASE FROM JURY—POWER OF COURT. A verdict cannot be directed because the evidence is overwhelming on one side, if there was a substantial dispute in the evidence on a material issue, the limit of power being to grant a new trial.

APPEAL (406)—REVIEW—DISCRETION—NEW TRIAL. After two jury trials, in which a particular issue was emphasized and twice decided the same way, it is not an abuse of discretion to refuse a new trial for insufficiency of the evidence, however strongly the verdict appears to be contrary to the evidence.

HUSBAND AND WIFE (94)—ACTIONS—JUDGMENT—AGAINST COMMUNITY. A judgment against S and against the community composed of S and his wife "and each of them" is not a personal judgment against the wife or a charge against her separate estate.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 26, 1919, upon

¹ Reported in 189 Pac. 550.

Apr. 1920]

Opinion Per FULLERTON, J.

the verdict of a jury rendered in favor of the plaintiff, in an action in tort. *Affirmed.*

C. J. Smith and Griffin & Griffin, for appellants.

Robert D. Hamlin, for respondent.

FULLERTON, J.—The respondent, Segrid Henrickson, brought this action against the appellants, C. J. Smith and Hilda M. Smith, to recover the sum of \$870 which she claims the appellant C. J. Smith, in his capacity as her attorney, collected for her use and did not account. In her complaint she alleged, in substance, that the appellants are husband and wife and as such form a marital community under the laws of the state of Washington; that the appellant C. J. Smith is an attorney at law, duly licensed to practice in the courts of the state of Washington; that, on November 7, 1916, she was struck by an automobile operated by one George O'Reilley, and sustained an injury to her person; that she employed the appellant C. J. Smith to act as her attorney in the prosecution of her claim against O'Reilley, no terms of employment being agreed upon; that the appellant accepted such employment and thereafter brought an action against O'Reilley, which action, after issue joined, was compromised, settled and dismissed without trial, O'Reilley paying to the appellant C. J. Smith, for her use and benefit, the sum of \$1,400; that of this sum the appellant paid on her account a physician's bill in the sum of \$175, hospital charges in the sum of \$100, and court costs in the sum of \$5; that his services as attorney in her behalf were reasonably worth the sum of \$250, but no more; that the appellants have retained all of the sum so collected, save such as he has paid as before stated, and claims that the respondent is entitled to receive of the sum collected \$395 thereof. She then

alleges that there is due and owing to her from the appellant C. J. Smith, and from the marital community composed of C. J. Smith and Hilda M. Smith, the sum of \$870, in which sum she demands judgment.

The appellants appeared separately, in response to process served upon them, and demurred to the complaint on the grounds that there was a defect of parties defendant, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were overruled, whereupon the appellants filed separate answers to the complaint. The appellant C. J. Smith, after certain denials, set up three affirmative defenses. The first was a claim for services performed and money loaned to the respondent, disconnected with the transaction for which she sues, on which there was due him the sum of \$51.50. In the second defense he set out his version of the transaction out of which the present action arises. He alleged that, after the respondent was injured by the automobile, he visited her at her request and then agreed orally with her to investigate the matter and ascertain whether in his judgment a collectible judgment could be obtained; agreeing, further, that, in the event an action should be brought and a recovery had, he would charge her as a fee for his services fifty per centum of the amount of the recovery. That he did investigate the matters and concluded to bring the action, and thereupon reduced the oral contract of employment to writing, which the respondent executed in the presence of two witnesses. He then alleges the commencement of the action, its settlement by the payment by the defendants therein of the sum of \$1,400, and that out of this sum he was entitled to deduct the agreed fee, the sums he had paid for the respondent's use, the respondent's indebtedness to him, and the costs of

Apr. 1920]

Opinion Per FULLETON, J.

the action, which left a balance in favor of the respondent in the sum of \$425.

The third affirmative defense is a counterclaim in damages for the sum of \$3,035.20 for libel. He alleges that, after the settlement of the action he had instituted for the respondent, and the difficulty had arisen between them, the respondent made complaint to the grievance committee of the Seattle Bar Association of his conduct with reference to the case,

"Thereby publishing that the defendant had committed a breach against the laws of the state of Washington, and particularly to have committed the crime of barratry;"

averring that the charges were false and libelous, were so found to be by the committee named, and that, by reason thereof, he had been damaged in the sum named.

The answer of the appellant Hilda M. Smith was in substance a general denial.

A reply was filed, denying in substance the first and second of the affirmative defenses, and a denial of the allegations of injury caused by the filing of the charges. To the latter were pleaded also the affirmative defenses that the charge was filed in good faith and was therefore privileged, and that it did not arise out of the transaction which gave rise to the subject-matter of her cause of action.

The action was twice tried by jury, and resulted in both instances in verdicts according to the demand of the complaint. The first verdict was set aside by the trial court because it believed it contrary to the evidence. On the second, a judgment was entered, and is the judgment from which the present appeal is prosecuted.

It is first assigned that the court erred in overruling the demurrers to the complaint. It is argued that the delinquency charged against the appellant C. J. Smith

constitutes a tort for which he alone is liable, unless it was committed in the conduct of the community business, or in business conducted for its benefit, of which there is no allegation in the complaint. But we cannot concur in this view of the pleadings. The complaint sets forth a tort perhaps in the sense that all breaches of contract are torts, but the matter alleged does not constitute a tort in the ordinary sense of that term. It shows merely a breach of duty in a business conducted by the husband. The fact that marital relation exists, and the further fact that the business conducted by the husband is his ordinary business, raises at once the presumption that the business is a community business. The presumption has the force of fact, and can be overcome only by countervailing allegations and proofs presented by the party who would dispute the presumption. It is not necessary that the pleader, claiming under the general rule, negative the exceptions thereto which could exist.

It is next assigned that the court erred in refusing to sustain the motion for nonsuit interposed on behalf of the appellant Hilda M. Smith. The correctness of this ruling depends upon the principle just discussed. The evidence was perhaps somewhat broader than the allegations of the complaint, since it showed, in addition to the existence of a marital relation between the appellants and that the business of the appellant husband was the practice of the law, that the appellant wife sometimes assisted him therein. But to prove the facts set forth in the complaint was sufficient to authorize the submission of the cause to the jury. As we say, these facts raised a presumption that the business was a community business, and there was no evidence contrary to the presumption. It is true that no judgment was sought against the wife personally. But

Apr. 1920]

Opinion Per FULLETON, J.

judgment was sought against the community, and the wife is always a proper party in such a case.

The third assignment is that the court erred in rejecting evidence offered to substantiate the matter alleged in the third affirmative defense. But the action of the court was properly sustained on the ground that facts pleaded were not a proper subject of counterclaim. The code (§ 265, Rem.) permits counterclaims to be set up in answer only where the cause of action sought to be counterclaimed arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or where it is connected with the subject of the action, or where the action is one on contract and the cause of action sought to be set forth also arises on contract and exists at commencement of the action. It is plain, we think, that these provisions do not include the cause of action here presented as a counterclaim. While the transaction set forth in the complaint as the foundation of the respondent's cause of action may have been the cause for making the complaint before the grievance committee of the bar association, yet such complaint was in no manner connected, either in law or fact, with that transaction. It was independent of it, and any cause of action arising therefrom must likewise be so independent. It is hardly necessary to add that the remaining provisions of the code furnish no foundation for the attempted counterclaim. There was no connection between the facts set forth as a counterclaim and the transaction set forth in the complaint, within the meaning of the code, nor did the cause of action set forth arise on contract.

The fourth assignment is that the court erred in refusing to direct a verdict for the appellants and in refusing to grant their motion for judgment notwithstanding the verdict. The principal controversy be-

•

tween the parties was over the question whether there was a contract between the appellant C. J. Smith and the respondent as to the fee Smith was to receive for his services. On this issue Smith not only testified to an oral agreement entered into at the time he was first employed, but produced a writing setting forth such an agreement purporting to bear the signature of the respondent. He also produced two witnesses whose signatures appear as witnesses to the purported signature of the respondent on the written instrument, and who testified that the respondent signed the instrument in their presence. On the other side was the testimony of the respondent alone. She testified that there was no agreement as to compensation between herself and the appellant C. J. Smith, and that she did not sign the paper which purports to bear her name. Based on this condition of the record, the appellants argue that the evidence is so overwhelming on their side as to require the court either to direct a verdict in their favor or to enter a judgment for them against the adverse verdict of the jury. But the rule is not such as this argument implies. By an express provision of the constitution of the state, and by the general laws, a litigant has the absolute right to have disputed questions of fact submitted to the determination of a jury. The appellate court, as well as the trial court, has power to see that such questions are properly submitted to the jury, and it is within the power of the trial court to set aside a verdict which he is convinced is contrary to the evidence and submit the disputed question to another jury. But this is the limit of the power. Judges of courts cannot, without violating the fundamental law, substitute their opinions, on disputed questions of fact, for the opinion of juries, and enter judgment contrary to verdicts of such juries. So here, since there was a substantial

Apr. 1920]

Opinion Per FULLERTON, J.

dispute in the evidence on a matter material to the inquiry, the court did not err in refusing to direct a verdict for the appellants, or in refusing to grant judgment in their favor notwithstanding the verdict.

In this connection it is argued that the court abused its discretion in refusing to grant a new trial. But there have been two trials of the cause, in each of which the jury has found against the appellants. In each of the trials the particular issue was emphasized, and it is to the interest of the public that there be an end to particular litigation. However strongly, therefore, we may believe the verdict to be contrary to the evidence, we cannot say that the trial court erred in the ruling.

The other assignments relate to the admission of certain testimony and to the court's charge to the jury, but these require no extended discussion. The evidence complained of, even if it could be said to be immaterial, was not prejudicial, and the court's charge generally was as favorable to the appellant as the evidence warranted.

Lastly, it is claimed that the judgment entered was a personal judgment against the appellant Hilda M. Smith. The judgment was in the following form:

" . . . the court, being fully advised in the premises, doth order, adjudge and decree that the plaintiff do have and recover of and from the defendant, C. J. Smith, and of and from the community composed of the defendants, C. J. Smith and Hilda M. Smith, his wife, and each of them, the sum of Eight Hundred Thirty-six (\$836) Dollars together with interest thereon at the rate of 6% per annum from November 15, 1917, until paid, together with the costs and disbursements of the plaintiff herein to be taxed according to law, and that execution issue upon said judgment."

This, we are clear, is a personal judgment against C. J. Smith and against the community composed of C. J. Smith and Hilda M. Smith, and not a judgment on which the separate property of Hilda M. Smith can be held. The objectionable clause, from the appellant's point of view, is found in the phrase "and each of them," following the individual names of the appellants. But plainly this refers to the "community composed of the defendants," and not to the defendants severally.

The judgment is affirmed.

MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15685. Department Two. April 22, 1920.]

FRANCES E. SLASOR, *Appellant*, v. KATE SLASOR, *as Executrix etc., Respondents*.¹

TENANTS IN COMMON (1)—TRUSTS (11)—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY. Findings that parties, contemplating matrimony, pooled their interests and became tenants in common or joint owners of property are not sustained, where it appears that the properties were contracted and partly paid for by the woman before any acquaintance with her future husband, who was without any means or business, that she gave him a power of attorney and he transacted her business for her, making some payments by checks signed as trustee, and on final payment took deeds to the property in his own name without her consent or knowledge.

HUSBAND AND WIFE (19, 47-1, 60)—WIFE'S SEPARATE PROPERTY—PURCHASED BEFORE MARRIAGE—EVIDENCE—SUFFICIENCY. Property contracted and paid for by the wife with deed delivered to her before marriage is her separate property; and where the bare legal title was placed in a bank as security for a loan, the fact that the bank, upon payment of the loan, redeeded the property to her and her husband does not make the same community property.

WILLS (79)—RIGHTS OF DEVISEES—TITLE OF DEVISOR. Where the testator was the holder of the bare legal title under a deed from one holding in trust, the property does not pass by his will, as the devisees take no greater interest than the deviser had to devise.

¹ Reported in 189 Pac. 546.

Apr. 1920]

Opinion Per FULLERTON, J.

Appeal from judgments of the superior court for King county, Hardin, J., entered August 7, 1919, upon findings in favor of the defendants, in consolidated actions for equitable relief, tried to the court. Reversed.

Ballinger & Hutson, for appellant.

Roberts & Skeel and *L. B. Schwollenbach*, for respondent.

FULLERTON, J.—This is an appeal by Frances E. Slasor from judgments entered in favor of the respondents in three separate actions consolidated for trial in the lower court, and consolidated for hearing on appeal in this court.

There are certain undisputed facts in the record necessary to be mentioned which are common to all of the actions. Kate Slasor was formerly the wife of Joseph M. Slasor, having intermarried with him on November 29, 1879. Of this marriage were born the respondents, Ray Slasor and Gaylie Slasor, each of whom are now approaching the middle age in life. Kate Slasor and Joseph M. Slasor were divorced at Seattle, Washington, on November 11, 1903, at the suit of Mrs. Slasor, the grounds being cruel treatment and personal indignities rendering life burdensome, and neglect and refusal on the part of the husband to make suitable provision for his family. After the divorce, Joseph M. Slasor lived in the vicinity of Seattle until the late summer of 1908, when he met the appellant, who was then a widow bearing the name of Lester. His acquaintance with her ripened into a marriage, which was solemnized at Victoria, in British Columbia, on March 24, 1909. The record does not disclose much concerning the habits, occupation or business of Mr. Slasor between the time of his marriage

and the time of his death. It does appear, however, that, shortly prior to his death, which occurred on August 25, 1918, he became ill and went, or was sent, to a hospital. From the hospital he went to the home of his former wife, where he stayed something over a week, returning again to the hospital, where he died a few days later. While at his former wife's home, he made a will in which he devised all of his property to his former wife, Kate Slasor, during her life, with remainder over to his children, naming the former wife as executrix of the will. She qualified as such and took possession of the real property here in dispute, claiming it to be the separate property of her devisor.

The appellant, Frances E. Slasor, then Mrs. Lester, first came to Seattle, in so far as the record discloses, in the year 1900. She had with her some money which she invested in a lot on North Broadway street. On this lot she caused a house to be erected. About a year later she went to Mt. Vernon, where she remained for the following six years, conducting a dress-making business. While at Mt. Vernon she sold the Broadway property and invested the proceeds in other properties in Seattle. From time to time during that period she made like investments, also out of the earnings of her business. During this period her properties in Seattle were managed by one James W. Nolan. He paid the taxes and other assessments levied thereon, looked after the repairs and collected the rentals. Mrs. Lester returned to Seattle in the "winter of 1907 and 1908," and from that time seems to have managed the properties herself until her meeting with Mr. Slasor. After the meeting, Mr. Slasor took an active part in the management of the properties, if, in fact, he did not take upon himself the entire duty.

Apr. 1920]

Opinion Per FULLERTON, J.

On June 11, 1909, the appellant executed a general power of attorney to her husband, Joseph M. Slasor, granting him power as her attorney in fact to transact any and all of her business, lease, mortgage, sell and convey her real and personal property, collect rents and other obligations due her. Shortly thereafter the appellant went to Tacoma, in the adjoining county, where she acted as nurse for an aged lady for the following two years. Returning to Seattle, she lived in one of her own houses "until it was rented," when she went again to Tacoma, where she lived until her husband's death. During the latter period she pursued various occupations, such as sewing by the day for others, nursing, and for a time took care of an invalid man for the privilege of a home. She was residing at Tacoma at the time of her husband's death. Her husband's occupation after marriage, as we have said, is not shown, further than he seems to have managed her properties. Acting under the power of attorney, he executed mortgages on each of the properties, and employed an attorney, sued for, and collected a note given to her prior to her marriage by James W. Nolan.

The first of the properties in dispute is described as lot two, in block thirty-seven, of the Supplemental Tract of Hill Tract addition to Seattle. It was formerly owned by one John J. Frantz. Sometime in the year 1907, Nolan, learning the property was for sale, made a deposit of fifty dollars on the purchase price on behalf of the appellant and telephoned her at Mt. Vernon recommending its purchase. The appellant came to Seattle to examine the property and, being satisfied therewith, entered into a contract with Frantz for its purchase, paying three hundred dollars on the contract price in addition to the payment made by Nolan. Thereafter the appellant made, through Nolan,

other payments on the property. After her acquaintance began with Mr. Slasor, he also made payments thereon, but from whose funds it does not appear. Two of such payments were made by check, the one dated October 31, 1908, for \$66.12, and the other, January 9, 1909, for \$41.40, each signed "J. M. Slasor, Trustee." The last of the payments was made by Slasor sometime in February, 1909. On February 25, 1909, a month prior to the marriage of Slasor with the appellant, Frantz and wife executed a deed to the property in which no grantee was named. The name of the grantee was omitted, so Frantz testifies, at the request of Mr. Slasor, who was representing the appellant's interest, the appellant herself not being present. The deed was recorded on April 2, 1909, at which time it bore the name of J. M. Slasor as grantee, and the recorder's certificate recited that it was recorded at his request. The original deed is in the record. On its face it substantiates the testimony of Frantz. The name of the grantee, while typewritten after the manner of the body of the deed, is written with a typewriter having a different style of type and a different colored ribbon than the typewriting machine first used. The appellant was not permitted to testify whom Mr. Slasor was representing when he made the payments mentioned and procured the deed, nor whose money it was from which the payments were made, but she was permitted and did testify that she never saw the deed, and did not learn that Slasor was named therein as grantee, until after his death. That Slasor had no visible property at the time he first met the appellant, the record also discloses. In the decree of divorce, entered at the suit of the first Mrs. Slasor, he was ordered to pay to her the sum of fifteen dollars per month for the support of the daughter, who is described as mentally defective, until such time as the

Apr. 1920]

Opinion Per FULLERTON, J.

daughter should be able to support herself. He paid none of the allowances, and Mrs. Slasor brought an action on the order and obtained a judgment thereon on February 9, 1906, for the sum of \$360. This judgment, she herself testifies, she was not able to collect. Testimony was also produced showing declarations made by Mr. Slasor, subsequent to his marriage with the appellant, to the effect that the property was the property of the appellant.

On these facts the trial court found that the appellant and Joseph M. Slasor became acquainted and their relations became intimate in the summer of 1908;

"That they thereafter pooled their business interests, and joined together in all business transactions; that the last payments on said real estate contract were made by Joseph M. Slasor, until the full purchase price thereof was paid."

Finding further that, after the deed was executed,

"Either the plaintiff or the said Joseph M. Slasor, acting with the knowledge and consent of the plaintiff, or some other person acting with the knowledge and consent of the plaintiff, inserted in said deed the name of Joseph M. Slasor as grantee."

As a conclusion of law, the court found the property to be the community property of Joseph M. Slasor and the appellant, decreed it to be such community property, and directed the executrix to administer upon it as such in the administration of the estate of Joseph M. Slasor, deceased.

The second of the above tracts is described as lot 12, in block 74, Plat of Central Seattle, by McNaught, and the third as lot 20, in block 16, Walla Walla addition to the city of Seattle. It is undisputed that these tracts were purchased, paid for, and deeded to the appellant long prior to her acquaintance with Joseph M. Slasor. In September, 1907, the appellant

and James W. Nolan purchased jointly a tract of land in the city of Seattle, not involved in these proceedings. To obtain the money to make the purchase, they borrowed \$900 from the American Savings Bank & Trust Company of Seattle. They jointly executed a note for the loan, and to secure it the appellant deeded to the bank the properties described. Both the appellant and Nolan made small payments on the note from time to time, and it was at one time renewed, the balance then due being \$420. About this time the appellant desired Nolan to take over the property and assume the liens upon it. This he did. The parties then had a settlement of the accounts between them, in which settlement it was found that Nolan was indebted to the appellant in the sum of \$393, and for this sum gave her his promissory note, payable in one year. The appellant thereafter continued her payments on the note, paying all of the balance due thereon, save the sum of \$100, prior to her first acquaintance with Mr. Slasor. The remainder of the obligation was paid in three installments, the first, of \$24.32, on December 31, 1908; the second, of \$74.68, on March 5, 1909, and the last, of \$1, on March 20, 1909. The officer of the bank who had charge of the collections did not remember who made the first of these payments, but testifies that the last two were made by Mr. Slasor. After the final payment, the bank redeeded the property. Its records made at the time show that it was deeded to the appellant under her former name of Frances Lester, but the recorded instrument (the original was not produced) names as grantees "Joseph M. Slasor and Frances E. Slasor (formerly Frances E. Lester)." Concerning this deed, also, the appellant testified that she had no knowledge that Mr. Slasor's name appeared therein as grantee until after his death.

As to these properties the court found, as in the

Apr. 1920]

Opinion Per FULLERTON, J.

case of the other property, that the parties became intimate after their acquaintance, contemplated matrimony, and joined together in their business interests, pooling their funds and transacting their business together; further finding that the appellant had knowledge of the conveyances and the form in which they were executed, and held the property out to the world as their joint property. As a conclusion of law, the court held that the parties owned the property as tenants in common, each owning an undivided half thereof. Judgment was entered in accordance with the findings and conclusions, with costs against the appellant.

The principal inquiry, therefore, is whether the findings made and the judgments entered by the trial court are sustained by the facts. Of the findings of fact common to each of the cases, it may be a just inference from the evidence that the appellant and Joseph M. Slasor became intimate, after their acquaintance in 1908, and contemplated matrimony, but clearly there is no evidence, or inference from evidence, from which it can be found that they thereafter pooled their business interests and joined together in all of their business transactions. Indeed, to our minds, the evidence points to the conclusion that Mr. Slasor was then utterly impecunious, with nothing to put into the pool. In addition to the evidence afforded by the decree of divorce and the money judgment obtained on the order for allowances, is the evidence that the appellant found it necessary after her marriage to continue her labors for her support. Sufficient is shown in the record, also, to lead to the conclusion that it was the life long habit of the appellant to transact this part of her business through the agency of others, and we think it more reasonable to conclude that, when Mr. Slasor made

payments on the outstanding obligations against these properties, he made them as her agent with her funds, rather than from his own funds or the combined funds of each of them. This conclusion is further borne out by the evidence afforded by the bank checks given in payment of the installments due on the first of the described properties. These, it will be remembered, were signed "J. M. Slasor, Trustee," indicating a bank deposit in that form — a form not uncommon where one deposits in a bank money belonging to another, but exceedingly so where the deposit is the depositor's own fund.

Nor do we find any evidence to support the finding, made with reference to the first of the described properties, that, after the execution of the deed therefor without naming the grantee,

"Either the plaintiff (appellant) or the said Joseph M. Slasor, acting with the knowledge and consent of the plaintiff, or some person acting with the knowledge and consent of the plaintiff, inserted in said deed the name of Joseph M. Slasor as grantee."

On the contrary, the evidence points to an opposing conclusion. The only evidence on the matter is the statement of the appellant to the effect that she did not know that Mr. Slasor's name was inserted therein as grantee until after his death. If the statement be true, then clearly the name was not inserted therein with her knowledge or consent.

The judgment with reference to this tract is erroneous in that it adjudges the property to have been the community property of Mr. and Mrs. Slasor. The property was purchased, paid for, and the deed thereto delivered prior to their marriage. Depending upon other circumstances, it could have been, when acquired, the separate property of Slasor, the separate property of the appellant, or the common property of both of

Apr. 1920]

Opinion Per FULLERTON, J.

them; but since the marital relation is essential to impress upon property when acquired a community character, it could have been in no sense their community property. But, if we were to treat the conclusion of the trial court as a finding that Joseph M. Slasor had an interest in the property as a tenant in common with the appellant, we think the finding without foundation. The property was contracted for and a substantial payment made on the purchase price by the appellant long prior to her meeting with Slasor. Between these times, she had paid the remaining part of the price, save a comparatively inconsiderable part. This, when considered with her habit of entrusting this part of her business to others, Slasor's impecuniosity, the manner in which he signed the checks for the payments made by him, and his declarations concerning its ownership, to our minds points unerringly to the conclusion that it was with her funds the purchase price was paid. This being so, the property is hers, notwithstanding Slasor is named in the deed of conveyance as grantee. The respondents, therefore, could acquire no interest therein as devisees under Slasor's will. Had they been purchasers from him for value and in good faith, a different question would be presented, but a devisee can take no greater interest in the devised property than the deviser has to devise.

It is true, as the respondents argue, that some ten years elapsed between the time of the conveyance and Slasor's death and it is not shown that the appellant made any effort to correct the mistake or wrong, if mistake was made or wrong committed. The force of the argument is appreciated, but we think it is met by the facts that the appellant has lived away from the property for almost the entire period, that Slasor, during that period, had had its exclusive management and control, and that the appellant did not know that she

was not the grantee named in the deed until after her husband's death.

With reference to the other properties, we are likewise unable to conclude that the evidence supports the findings made by the trial court. The first of these findings we have sufficiently discussed. As to the second, there is the positive testimony of the appellant to the effect that she did not know that Joseph M. Slasor was named therein as a joint grantee with her. But it would seem that knowledge on the appellant's part of the execution of this deed in the form in which it was executed would not alone have been sufficient to vest a beneficial interest in the properties in Joseph M. Slasor. The property was originally the appellant's property. She deeded it to the bank as security for a loan. When the loan was paid, the bank stood as the holder of the naked legal title to the property, with no beneficial interest in it whatsoever. Having nothing but a naked legal title, a naked legal title was all it could convey. The beneficial interest being in the appellant, the bank, when it conveyed the legal title to the appellant and Joseph M. Slasor, vested no part of such interest in the latter. The title acquired by him through the deed could rise no higher than its source, and consequently could be no more than an interest in the naked legal title. Knowledge on her part that he was named as one of the grantees in the deed, or even consent on her part that he be so named, would not alone vest in him a substantial interest. Before such a result could follow, it must be shown that Joseph M. Slasor acquired from the appellant, the holder of the beneficial interest, all or some part of such interest. This the record not only fails to show, but, to our minds, does show affirmatively that he acquired no such interest.

Apr. 1920]

Opinion Per MITCHELL, J.

There is no need to pursue the inquiry. The judgment in each of the causes is reversed, and the causes are remanded with instructions to enter judgment in each of them in favor of the appellant, to the effect that she is the owner of the property there in question and that the respondents have no interest therein.

HOLCOMB, C. J., TOLMAN, MOUNT, and BRIDGES, JJ.,
concur.

[No. 15791. Department Two. April 22, 1920.]

THE STATE OF WASHINGTON, *on the Relation of F. H. Godfrey, Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *W. O. Chapman, Judge, Respondent.*¹

MANDAMUS (3, 4)—TO COURTS—REMEDY BY APPEAL. Mandamus does not lie to compel the superior court to set aside its order sustaining a demurrer to an application for a mandamus of which it had jurisdiction; since there is a remedy by appeal and the mere question of delay does not affect the question of adequacy of the remedy.

Application filed in the supreme court March 8, 1920, for a writ of mandamus to compel the superior court for Pierce county, Chapman, J., to vacate an order quashing an alternative writ of mandate, and to further proceed with the cause. Denied.

Stiles & Latcham, for relator.

William D. Askren, Frank D. Nash, and J. A. Sorley,
for respondent.

MITCHELL, J.—The relator, by mandamus proceedings in the superior court for Pierce county, commenced an action against the treasurer of that county to have a portion of the tax levied and assessed against

¹ Reported in 139 Pac. 256.

relator's property in Tacoma declared illegal because in excess of the amount permitted to be levied by the provisions of the charter of the city, and to require the treasurer to accept and receipt for the proper tax. An alternative writ of mandate was issued and served, whereupon the treasurer appeared in the cause and filed a general demurrer to the alternative writ, and moved to quash the same, upon the grounds that the alternative writ and the affidavit upon which it was based did not state facts sufficient to authorize the issuance of the writ demanded. Upon being presented to the superior court, the demurrer was sustained and the alternative writ was ordered quashed. Thereupon the present application was made to this court for a writ of mandate to compel the respondent, as judge of the superior court, to set aside the order sustaining the general demurrer and quashing the alternative writ, and to proceed with the action to final determination.

Relator contends he is fortified in the present application by some of the reasons given by the trial court in making the ruling complained of. To the contrary, we are satisfied the result of the ruling must control. With both parties before it, the jurisdiction of the trial court was never questioned, nor did that court refuse to entertain jurisdiction; it only sustained a general demurrer to the sufficiency of the application for a writ of mandate. If relator were allowed to prevail in this proceeding, it would amount to permitting the writ of mandate to take the place of the remedy by appeal. It would be equal to saying now, in the absence of any showing or reason that there is not a plain, speedy and adequate remedy in the ordinary course of law, that the superior court, having jurisdiction of the subject-matter and of the parties, had committed error in the process of settling the pleadings in the cause. It would result in a direction from this

Apr. 1920]

Opinion Per MITCHELL, J.

court to the trial court to reverse its ruling and to decide that the petition or affidavit presented there was entirely sufficient to constitute a cause for the relief demanded, and to proceed with the matter of making up the issues, together with the trial of the facts. Indeed, that is just what is now specifically demanded by the relator. Under the terms of § 1014, Rem. Code, the purpose of the issuance by this court of a writ of mandate directed to a superior court is to compel the performance of an act which the law especially enjoins as a duty resulting from that office; its purpose is not to compel the superior court to perform an act in a particular way, nor to decide in favor of one or the other of the litigants. In the present case, the judge of the superior court has already acted. In doing so he acted judicially, and entered an order made during the progress of the cause, manifestly considered proper and necessary by the court in the determination of the issue of law presented. As such, that order is not reviewable in advance of the final judgment entered in the cause, provided, of course, the remedy in the ordinary course of law or by appeal is plain, speedy and adequate. The authorities are unanimous to the effect "that neither a writ of mandate nor other extraordinary writ can be used to perform the office of an appeal to review the judicial action of an inferior tribunal." *State ex rel. Langley v. Superior Court*, 74 Wash. 556, 134 Pac. 173. Section 1015, Rem. Code, provides: "The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law . . ." and this court has often said, "that the adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied by this court in all applications for extraordinary writs, . . ." *State ex rel. Miller v. Superior Court*, 40 Wash. 555,

82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395. As we understand, the only claim made that the remedy by appeal in the present case would not be efficacious is because of delay; but, in common with other courts, we have standfastly announced the rule that the mere question of delay or expense is not sufficient to disturb the ordinary course of law or remedy by appeal. *State ex rel. Miller v. Superior Court, supra.*

We take no occasion to review many cases and authorities cited from this and other courts in the arguments of respective counsel, feeling satisfied that what we have said herein is sufficient for the proper disposal of the case.

The application for the writ will be denied.

HOLCOMB, C. J., TOLMAN, PARKER, and FULLERTON, JJ., concur.

[No. 15719. *En Banc*. April 22, 1920.]

D. O. PRATT, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS (134) — PUBLIC IMPROVEMENTS — ORDINANCE—CONSTRUCTION. In condemnation proceedings to pay compensation to property owners through a change of street grades, under an ordinance making no provision for the physical work contemplated, the cost of the "improvement" is descriptive of the proposition and has reference only to the cost of acquiring the property rights.

SAME (174-177)—EMINENT DOMAIN (64)—PUBLIC IMPROVEMENTS —INADEQUACY OR FAILURE OF SPECIAL FUND—GENERAL LIABILITY. Where a city took and damaged property by making a change of grade authorized by eminent domain proceedings, contemplating that the costs be assessed against property benefited, it became unconditionally bound under Const., art. 1, § 16, to make compensation therefor in accordance with the condemnation awards; hence, where the special fund failed when it was judicially determined that the property assessed was not benefited, the city had power to make the

¹ Reported in 189 Pac. 565.

Apr. 1920]

Statement of Case.

cost a general charge against the city, and issue bonds to pay the same.

SAME. In such case it is immaterial that some of the owners had in form satisfied the condemnation awards in return for warrants issued against the special fund, which was never collected by the city; since the award is not in law satisfied until actually paid in money or general indebtedness warrants payable in due course.

SAME. Where a city undertook and completed physical improvements of streets to be paid for solely by funds to be raised by special assessments upon the property benefited, it is not liable generally for a deficiency arising when part of the assessments could not be collected because part of the property was not benefited and there was no other property benefited against which further assessments could be levied; and the city not being liable, it has no power to assume the deficiency as a general indebtedness of the city.

SAME. In such a case the fact that the city and the contractor were honestly mistaken in the belief that the special benefits would be sufficient to pay the costs of the improvement, does not authorize the city to assume a general indebtedness for the amount of the deficiency.

SAME. In such a case the deficiency is not such a moral obligation on the part of the city as to authorize the city to assume its payment, where there was no attempt by the city to change from a special assessment plan to a general indebtedness prior to the completion of the improvement, and the ordinance expressly notified the contractor that the improvement was to be paid for wholly from special assessments, and that no part would be a general charge against the city.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 5, 1919, in favor of the defendant, dismissing an action to enjoin the issuance of bonds for a local improvement, tried to the court. Affirmed in part and reversed in part.

Fred W. Catlett, for appellant.

Walter F. Meier and *Robert H. Evans*, for respondent.

Peters & Powell, *Preston*, *Thorgrimson & Turner*, and *Donworth*, *Todd & Higgins*, amici curiae.

PARKER, J.—The plaintiff, Pratt, a resident and taxpayer of the city of Seattle, commenced this action in the superior court for King county, seeking a judgment enjoining the city and its officers from consummating two proposed bond issues evidencing a general indebtedness of the city; one for \$270,000 and one for \$110,000, the former to pay judgments awarding compensation for the taking and damaging of private property resulting in the change of grades of Shilshole avenue made in eminent domain proceedings prosecuted by the city, and the latter to pay the cost of the physical improvement of that avenue at the grades as changed. In the initial ordinances authorizing the condemnation proceedings and the making of the physical improvement, the city provided for the payment of compensation to the owners of the property to be taken and damaged by the change of grades and for the physical improvement, exclusively by assessments against the property which it was then supposed would be benefited thereby; which plans for raising funds to pay such damages and cost of the physical improvement were thereafter changed by the city to that of making the whole cost of both propositions a general indebtedness of the city, which it is now proposed to evidence by the bond issues in question. The case was submitted to the superior court for final decision upon the admitted facts appearing in the pleadings, resulting in a judgment denying to the plaintiff the relief prayed for, and dismissing the action. From this disposition of the case, the plaintiff has appealed to this court. The question of the legality of each of the bond issues is presented in a separate cause of action. While they have some facts in common, we think the controlling legal principles lead to different results. We shall, therefore, discuss them separately.

Apr. 1920]

Opinion Per PARKER, J.

The controlling facts of the case touching the rights of appellant and the power of the city, in so far as we are here concerned with the first cause of action, may be summarized as follows: On August 15, 1912, the city passed ordinance No. 29,834, changing the established grades of Shilshole avenue, and directing the corporation counsel to commence and prosecute condemnation proceedings in the superior court for King county to the end that the city acquire the necessary property rights to enable it to make such change of grades. It was provided in this ordinance:

“That the entire cost of the improvement provided for herein shall be paid by special assessment upon property specially benefited in the manner provided by law, and that no part thereof shall be paid from the general fund of the city of Seattle.”

While the word “improvement” is there used as descriptive of the proposition, manifestly it does not mean physical improvement, since the ordinance makes no provision for any such improvement, though, of course, the city authorities no doubt contemplated the making of a physical improvement at the changed grades, after acquiring by condemnation proceedings the right so to do. It is equally plain that the words “cost of the improvement,” as used in this quoted portion of the ordinance, mean only the cost of the acquisition of such property rights as will enable the city to thereafter physically improve the avenue at the changed grades. Thereafter condemnation proceedings were accordingly commenced and prosecuted in the name of the city in the superior court for King county, resulting in an adjudication that the contemplated use of the property rights so sought to be acquired by the city was a public use, and in verdicts and judgments awarding the owners of the property compensation for their property to be taken and dam-

aged for such use. Some of these judgments were, in form, satisfied upon the record of judgments in the superior court, the judgment creditors receiving therefor from the city warrants upon the special assessment fund which it was contemplated would thereafter be created and raised by special assessment against property it was thought would be benefited by the change of the grades. The balance of the judgments remain wholly unsatisfied and unpaid in any form. These satisfactions, in form, of some of the judgments, we must presume were in the manner and for the purpose as provided by § 953, Rem. Code, which requires a judgment creditor of a municipality to first satisfy his judgment upon the judgment records of the superior court and then take a certified transcript of the judgment and the satisfaction so made of record to the proper officer of the municipality liable to pay the same, when he becomes entitled to payment of the judgment.

Following the entry of the condemnation judgments awarding compensation for property taken and damaged, the eminent domain commissioners of the city prepared an assessment roll, charging the entire cost thereof against the property supposed to be benefited by the change of grades. A hearing in the superior court upon the return of the assessment roll so made, as provided by §§ 7787-7796, Rem. Code, resulted in the entry of an order by that court sustaining the right to levy special assessments to pay the cost of acquiring and damaging the private property as adjudged, over the objections of the owners of the property sought to be so assessed, and re-referring the assessment roll to the eminent domain commissioners with direction to make certain modifications in the assessment as originally made by them. The objecting property owners thereupon appealed to this court from the

Apr. 1920]

Opinion Per PARKER, J.

order of the superior court, in so far as it sustained the right of the city to make any assessment to pay the cost of acquiring the property rights condemned by the city. Thereafter, on May 18, 1915, that order and judgment of the superior court was reversed by this court, it being held that none of the property of any of the objectors would receive any benefits whatever from the change of grades as made by the city. (*In re Shilshole Avenue*, 85 Wash. 522, 148 Pac. 781.) That decision contains a history in considerable detail of that controversy, which, while interesting in this connection, need not be further noticed here. The city has never made, or attempted to make, any other assessment roll looking to the raising of funds to pay the unsatisfied judgments, or those which were in form satisfied, or the special fund warrants issued for the latter. On May 1, 1918, the city passed ordinance No. 38,374, amending the above quoted portion of ordinance No. 29,834 to read as follows:

“That the entire cost of the improvement provided for herein shall be paid from the general fund of the city of Seattle or such other fund as the city council shall direct.”

Thereafter, on the same day, there was passed ordinance No. 38,377, providing for the issuance of \$270,000 of bonds evidencing a general indebtedness of the city, to raise funds to pay all of the judgments rendered in the condemnation proceedings, including the special warrants issued to those whose judgments were in form satisfied. This is the proposed bond issue included in the first cause of action, sought to be enjoined. The city has taken possession of all the property and caused all the damages for which the condemnation judgments awarded compensation, and has physically improved the street at the grades, but the city has not paid any of those judgments, except

merely in form, as above stated, though it has now full enjoyment of all the rights sought to be acquired by it in the condemnation proceedings.

Our problem, presented by the first cause of action, in its last analysis, as we view it, is this: Has the city the power to assume and pay as a general indebtedness the condemnation judgments awarding compensation for the property taken and damaged which enabled it to lawfully change the street grades in question? Counsel for appellant contend that the city does not have such power, because the condemnation proceedings were commenced and prosecuted to final judgments only by authority of ordinance No. 29,834, which, in effect, provided that the entire cost of acquiring the property rights sought to be condemned should be paid by special assessments upon the property specially benefited by the change of the street grades in question. In that behalf counsel invoke the law as announced in our decisions holding, in substance, that, when a municipality initiates a local improvement proceeding and constructs the improvement with the avowed purpose, from the beginning, to pay therefor exclusively from the proceeds of special assessments against property which it is contemplated will be benefited thereby, the city does not become liable for any part of the cost of such improvement as a general indebtedness; citing, *State ex rel. Security Sav. Soc. v. Moss*, 44 Wash. 91, 86 Pac. 1129; *State ex rel. Barnes v. Blaine*, 44 Wash. 218, 87 Pac. 214; *State ex rel. American Freehold-Land Mtg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321; *State ex rel. National Bank v. Tacoma*, 97 Wash. 190, 166 Pac. 66. These, and several other decisions by this court so holding which counsel might have cited, all have to do with the construction of physical improvements as local improvements. None of them involved the taking or damaging of pri-

Apr. 1920]

Opinion Per PARKER, J.

vate property by a municipality in the exercise of its power of eminent domain.

It seems to us that a recurrence to the guarantee of our constitution that, "no private property shall be taken or damaged for public . . . use without just compensation having been first made" (section 16, art. 1, constitution), renders it at once plain that the city of Seattle, when it took and damaged the private property for which compensation was awarded in the judgments rendered in the condemnation proceedings which it commenced and prosecuted in the exercise of its power of eminent domain, became unconditionally bound to the persons whose property it so took and damaged, to make compensation therefor in accordance with the judgments rendered. These private property owners were not voluntary sellers of their property rights. They entered into no voluntary contract with the city agreeing to look to any questionable source of payment for their property rights so parted with. They were bound to submit to the city's taking and damaging of their property through the orderly procedure of condemnation. True, they were not bound to surrender possession of their property or to submit to it being damaged before actually receiving compensation therefor; but the fact that they did permit the city to actually take and damage their property, after the rendering of the condemnation judgments awarding them compensation and before they received such compensation, we are of the opinion, is not a fact which the city should be permitted to set up and take advantage of, even if it desired so to do, to avoid its full constitutional duty to make just compensation according to this mandate of our constitution. It may be that the constitutional debt limit of the city would, if exceeded when the obligation to make compensation was incurred, stand in the way of making such com-

pensation as for taking private property in the exercise of the city's power of eminent domain, and that such situation would work an exception to the rule we announced; but even then we apprehend that the city would be legally liable to make restitution of the property taken, and, also, restitution in the form of damages to the extent that the situation rendered it impossible to otherwise restore the property rights of the private owners as they existed before the taking and damaging of their property. We need not, however, pursue this interesting inquiry, since there is no question of the constitutional debt limit of the city presented to us on this appeal, though it does seem to have been a question in the superior court, where it was decided that neither of these proposed bond issues would cause the city to exceed its constitutional debt limit.

In *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820, there was involved the question of the necessity of presentation of a claim for damages to the city as a prerequisite to the right of the claimant to sue the city seeking recovery of compensation for damages suffered by him from the city's occupancy of a portion of his lot by a supporting slope in the making of a street improvement. Holding that the city, having so occupied the lot, did so in the exercise of its power of eminent domain, and that the plaintiff was entitled to compensation, not as for a tort, but as a matter of constitutional right, and that therefore he was not required to file his claim with the city as a prerequisite to the right to seek compensation in the courts, Judge Chadwick, speaking for the court, said:

“The remedy of the one whose property is taken is immaterial so long as it leads to compensation as provided in the constitution. The city is bound to make compensation under a compact no less formal than the

Apr. 1920]

Opinion Per PARKER, J.

constitution itself, and it cannot defeat this constitutional right by a charter provision or an ordinance, nor can the legislature take it away by any arbitrary requirement, although we may admit that it could, as in all other cases, fix a time within which an action must be brought to recover damages that have not been first ascertained and paid. The city must be held to adopt the guarantee of the constitution and make it its promise."

Further observations and review of the authorities in that exhaustive opinion also render it plain that a private property owner's right to compensation under the constitution is as unconditional and absolute after he has voluntarily permitted the municipality to take and damage his property in the exercise of its power of eminent domain as is his right to withhold possession of his property sought to be so condemned or prevent damage thereto before compensation therefor is actually made. Our later decisions in *State ex rel. Peel v. Clausen*, 94 Wash. 166, 162 Pac. 1, and *Jacobs v. Seattle*, 100 Wash. 524, 171 Pac. 662, L. R. A. 1918E 131, adhere to this view of the unconditioned right of a private property owner to compensation when he seeks to assert such right in the courts, after having parted with possession of his property or suffered damage in the exercise by the state or a municipality of the power of eminent domain, as well as when he seeks to assert such right by securing compensation before the taking or damaging of his property.

Some contention is made on behalf of appellant that those private owners whose property was taken and damaged, who have, in form, satisfied the condemnation judgments rendered in their favor, and who had issued to them warrants upon the prospective special assessment fund, are, in effect, estopped from claiming that the city is legally liable to them as a general indebtedness of the city. We have seen that we must

assume that these judgments were satisfied in form as provided by § 953, Rem. Code, which requires them to be satisfied of record, and the presentation by the judgment creditor of a transcript of such judgment and satisfaction to the proper disbursing officer of the city, to the end that the amounts thereof be paid in due course. We are of the opinion that those property owners, or their assigns, assuming that some of the warrants may have been transferred, who, of course, stand in the shoes of the judgment creditor property owners, are in no different position than the judgment creditors whose judgments have not been so satisfied. This, we think, must follow from the absolute unconditional nature of the obligation the city assumed when it took and damaged the property in the exercise of its power of eminent domain. Manifestly, when a judgment creditor goes to the clerk of the superior court and satisfies his judgment upon the records with a view to collecting it from the municipality against which it runs, it is not in law satisfied so as to relieve the municipality from liability thereon until the municipality actually pays the judgment creditor in money; or, in any event, gives him a warrant chargeable against the municipality as a general indebtedness, to be paid in due course.

We are quite convinced that the city cannot escape liability as a general debtor owing the amount of compensation awarded to the private owners of property taken and damaged by it in the exercise of its power of eminent domain, even though in the inception of the project for which it so takes or damages private property it avowedly proclaims that payment is to be made from funds to be raised exclusively by special assessments. The city may, of course, make its intention known in the beginning that it expects to resort only to the local assessment to raise sufficient funds to

Apr. 1920]

Opinion Per PARKER, J.

pay for the necessary taking and damaging of private property, and finding that sufficient funds cannot be so raised, abandon its project; but it cannot go to the extent of actually taking and damaging the property and escape paying compensation therefor as a general indebtedness, though it may escape such a liability in the making of a physical improvement as a local improvement, where those who make the improvement voluntarily enter into contractual relations with the city, agreeing to look only to a special assessment fund. The judgment of the superior court, in so far as it denies appellant relief upon his first cause of action involving the \$270,000 proposed bond issue, is affirmed.

The controlling facts of the case touching the rights of appellant and the power of the city, in so far as we are here concerned with the second cause of action, may be summarized as follows: Soon after the passage of ordinance No. 29,834, authorizing and directing the commencement of prosecution of condemnation proceedings, above noticed, the city passed ordinance No. 30,389, providing for the physical improvement of Shilshole avenue at the changed grades, it evidently being assumed that the condemnation proceedings would soon be prosecuted to a successful determination and the city thereby acquire the necessary rights to enable it to proceed with the physical improvement. This ordinance seems to be in the usual form of initiatory local improvement ordinances which look to the physical construction of such improvements and the paying of the entire cost thereof by special assessments against property which may be benefited thereby. It contains, among other provisions, the following:

“The cost and expense of said improvement, including all necessary and incidental expenses, shall be borne by and assessed against the property included

in the assessment district hereinafter created in accordance with law. The city of Seattle shall not be liable in any manner for any portion of the cost and expense of said improvement, except as herein provided."

The words "except as herein provided," read in the light of other provisions of the ordinance, render it plain that they do not mean that the city assumes any other obligation looking to the payment of the cost of the improvement than that it will, in good faith, attempt to levy special assessments sufficient to pay the entire cost of the improvement and apply the proceeds thereof to the payment of such cost. Thereafter, solely by authority and in pursuance of the provisions of this ordinance, the proper officers of the city duly awarded and entered into a contract for the construction of the improvement, and the improvement being completed as contracted for, an assessment roll was prepared in usual form, charging and apportioning the entire cost of the improvement against property claimed to be benefited by the improvement. This assessment roll was placed on file with the city council and duly noticed for the hearing of objections thereto which might be made by the owners of property so charged with the cost of the improvement, as provided by § 7892-21, Rem. Code. Thereupon a considerable number of the owners of property so sought to be assessed filed objections to the assessment roll, claiming that their property received no benefit from the improvement. The city council overruled these objections and passed an ordinance finally confirming the assessment roll as made and filed. To the end that there be no uncertainty as to the city's claim of what disposition was made of the matter upon appeal to the superior court, we quote the language of its affirmative answer in this case, as follows:

Apr. 1920]

Opinion Per PARKER, J.

“That thereafter the property owners protesting against said roll appealed to the superior court of King county from the order of the city council confirming said roll, and said cause was duly heard in said court, with the result that thereafter the superior court, on the 29th day of February, 1916, entered an order modifying and cancelling the assessments made against the property of said protestants. That this had the effect of creating a large deficiency in said local improvement district No. 2601. That assessments in the amount of \$59,333.98 were wholly cancelled by said decree of the court. That, as regards other property protesting, the superior court made deductions amounting to large sums of money, which further created a deficit in said roll of approximately \$31,000.”

This is all the information the record before us furnishes touching the nature and extent of the judgment of the superior court. This judgment was affirmed in all respects upon an appeal taken therefrom by the city to this court, on February 8, 1917. (*In re Shilshole Avenue*, 94 Wash. 583, 162 Pac. 1010.) While the total amount of the cost of the improvement does not appear in the record before us, it would seem, from the general nature and extent of the improvement, that its total cost was a very large sum and far in excess of the amounts of the deficiency specified in the above quoted language of the city's affirmative answer. It is, in any event, certain that the judgments of the superior court and of this court created only a partial deficiency and left a large portion of the assessments undisturbed and in full force. The city authorities being of the opinion that, by reason of the decisions of the superior court and this court, the city was without power, because of lack of special benefits, to make a new assessment or re-assessment of the property of the objectors in whose favor these decisions were rendered, and being also of the opinion that no additional assessments, because of lack of benefits, could be made

against the property of others, it abandoned all further attempt to raise sufficient funds by special assessment to pay the deficiency so created, and on April 9, 1918, passed ordinance No. 38,339, by the terms of which it assumed, as a general indebtedness of the city, the total amount of the deficiency so created, together with accumulated interest thereon as evidenced by outstanding warrants theretofore issued against the special local assessment fund; and authorized the issuance, for the payment thereof, of \$110,000 of general indebtedness bonds of the city. It is by his second cause of action that appellant seeks to enjoin the city from assuming this obligation as a general indebtedness and evidencing the same by this proposed bond issue.

The contentions here made in appellant's behalf in support of his second cause of action are substantially the same as made in support of his first cause of action, which we have already considered; that is, that the city authorities are attempting to create a general indebtedness of the city to pay an obligation which it is neither legally liable to pay as a general indebtedness, nor legally authorized to voluntarily pay as a general indebtedness. We have seen that the obligation involved in the first cause of action is one which the city is legally liable to pay as a general indebtedness because of the constitutional rights of the persons whose property the city took and damaged in the exercise of its power of eminent domain; but we think the legal liability of the city to pay, as a general indebtedness, this obligation, is quite a different matter. It has been uniformly held by this court that municipalities are not legally liable to pay from their general funds any of the cost of the physical construction of local improvements which they avowedly initiate and carry to completion to be paid for solely from funds to be raised

Apr. 1920]

Opinion Per PARKER, J.

by special assessment against property which it is contemplated will be benefited thereby, and this is so even though the special assessment prove unavailing in raising sufficient funds to pay the cost of such improvement. *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524; *Rhode Island Mortgage & Tr. Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104; *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *State ex rel. Security Sav. Soc. v. Moss*, 44 Wash. 91, 86 Pac. 1129; *State ex rel. Barnes v. Blaine*, 44 Wash. 218, 87 Pac. 124; *State ex rel. American Freehold-Land Mortgage Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321; *Soule v. Ocosta*, 49 Wash. 518, 95 Pac. 1083; *State ex rel. National Bank of Tacoma v. Tacoma*, 97 Wash. 190, 166 Pac. 66.

Counsel for the city seek to avoid the force and application of this well settled rule to this branch of the case by alleging in its affirmative defense, in substance, that there was a mutual mistake, both of law and fact, on the part of both the city and contractor constructing the improvement, in that they both believed, and in good faith proceeded upon the assumption, that the special assessments contemplated could be lawfully made upon property benefited by the improvements in a sufficient amount to pay the entire cost of the improvement. To our minds, the city's allegations in this behalf amount to nothing more than that it and the contractor were honestly mistaken in their belief that the special benefits resulting from the construction of the improvement would be sufficient in amount to pay the entire cost thereof. We are clearly of the opinion that this would not render the city legally liable to pay any part of the cost of the improvement as a general indebtedness of the city. To hold that

such a mistake would have such an effect would be to ignore the reasoning that lies at the very foundation of the decisions above cited. We therefore conclude that the present attempt on the part of the city authorities to pay this special assessment deficiency, as a general indebtedness of the city, is an attempt to assume, as a general indebtedness of the city, an obligation which the city is under no legal liability whatever to assume or pay.

The question remains, does the deficiency in the special assessment fund constitute such a moral obligation of the city that it may voluntarily assume and pay the same as a general indebtedness. It is to be remembered that this is not a case of the city changing from a special assessment plan of paying for the improvement to that of paying for it as a general indebtedness, before the entering into of the contract for its construction, or even before its final completion as contracted for. The method of payment exclusively by special assessment was determined upon and fixed in the original ordinance authorizing the construction of the improvement, which ordinance in express terms, in effect, notified the contractor and all the world that the improvement was to be paid for wholly from the proceeds of special assessments to be charged against property that might be benefited thereby, and that no part of the cost thereof would be a general charge against the city. No doubt the contractor made his bid accordingly. No attempt was made on the part of the city to change the plan of payment until long after the completion of the construction of the improvement by the contractor, when the city attempted to make such change by the passage of the ordinance assuming to make the deficiency a general indebtedness of the city and evidence the same by this proposed \$110,000 bond issue.

Apr. 1920]

Opinion Per PARKER, J.

The decision of this court in *State ex rel. American Freehold-Land Mortgage Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321, seems to us in principle decisive in favor of appellant's contention here made. In that case the city of Port Townsend agreed with holders of warrants issued against special local assessment funds; created with a view of their being the exclusive source of payment of the cost of local improvements, that it would permit the warrant holders to obtain judgments against it in the superior court for Jefferson county by default, and would thereupon satisfy the judgments by the issuance of warrants against the general funds of the city, thereby making the special assessment obligation a general indebtedness of the city. This plan being consummated, it seems to us, the parties were in the same position as if they had consummated a contract by which the city should assume a special assessment indebtedness as a general indebtedness, since the judgments were taken by default against the city in pursuance of an agreement to that effect. A subsequent administration of the city refused to honor the agreement and the default judgments taken in pursuance thereof, and by proper action in the superior court of that county, it was adjudged that such default judgments were taken through collusion and fraud on the part of the city. They were accordingly set aside and the city absolved from its contract by which it, in effect, assumed the special assessment indebtedness as a general indebtedness. That judgment was affirmed by the decision of this court. As we understand its reasoning, as applicable to the situation here involved, the rendering of the judgments by collusion and the setting aside of them for that reason was only incident to the controlling principle involved, which was, that the special assessment obligation was not one that the city had power to voluntarily assume after the com-

pletion of the local improvements, they having been initiated and carried to completion with the avowed purpose on the part of the city that their entire cost should be paid for from the funds to be raised by special assessments against property benefited thereby. Our recent decision in *State ex rel. National Bank of Tacoma v. Tacoma*, 97 Wash. 190, 166 Pac. 66, is in full harmony with this view of the law. It is true that in that case the city was not attempting to pay special assessment obligations as general indebtedness of the city, but it was attempting to pay special assessment obligations with funds over which the city had control other than those which were the proceeds of the special assessments levied to pay the cost of the particular improvements. Judge Holcomb, speaking for the court, made this observation:

“The city had no power to provide for the payment of the obligations of the improvement district or the bonds to pay the obligations thereof except in the manner provided by law, and the law limited the payment to the assessments against the property. These improvement districts are special creatures of the law and each of them must stand by itself. The only way in which a deficiency can be provided for in any one district is by another assessment in each case.”

Our former decisions in *State ex rel. Security Sav. Soc. v. Moss*, 44 Wash. 91, 86 Pac. 1129, and *State ex rel. Barnes v. Blaine*, 44 Wash. 218, 87 Pac. 124, are in harmony with this view of the law. Nor are these decisions the sole support of appellant's contentions upon this branch of the case. In § 28, art. 4, of the charter of Seattle, we read:

“Neither the city council nor any officer, board, department or authority shall allow, make valid or in any manner recognize any demand against the city which was not at the time of its creation a valid claim against the same, nor shall they or any of them ever

Apr. 1920]

Opinion Per PARKER, J.

allow or authorize to be paid any demand which, without such action, would be invalid, or which shall then be barred by any statutes of limitation, or for which the city was never liable, and any such action shall be void."

Our conclusion is that not only are the city authorities attempting to assume, as a general indebtedness, an obligation which the city is not legally liable to pay as such an indebtedness, but that the city authorities are plainly exceeding their power in attempting to cause the city to voluntarily assume such obligation as a general indebtedness.

The judgment of the superior court, in so far as it refuses injunctive relief as prayed for in appellant's second cause of action, to prevent the assumption by the city of this special assessment indebtedness as a general indebtedness and evidencing of the same by the proposed \$110,000 bond issue, is reversed, and the cause remanded to the superior court with directions to render its judgment awarding an injunction accordingly.

Appellant is awarded his costs incurred in this appeal.

HOLCOMB, C. J., TOLMAN, MACKINTOSH, MITCHELL, MOUNT, MAIN, and BRIDGES, JJ., concur.

[No. 15729. Department Two. May 8, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
W. W. Sherman, State Treasurer, Plaintiff, v.
E. F. BENSON, as Commissioner of
*Agriculture, Respondent.*¹

STATUTES (67)—EXECUTIVE CONSTRUCTION. The courts are not bound by the construction of statutes by the administrative officers, even though approved by the law officers for a number of years.

SAME (68)—LEGISLATIVE CONSTRUCTION. The courts should give heed to legislative construction of prior acts.

SAME (45)—REPEAL OF SPECIAL BY GENERAL ACT. A special act is not repealed by a general act, contrary to the obvious legislative intent.

SAME (69)—CONSTRUCTION WITH REFERENCE TO OTHER STATUTES. General enactments do not apply in the interpretation of special statutes, and the functioning of state institutions under special acts is not generally affected by general restrictive laws governing the collection of revenues.

AGRICULTURE (3) — BOARDS AND OFFICERS — POWERS — STATUTES. Under the act of 1893, Rem. Code, § 3004, defining the powers of the state fair commission, and the act of 1913, Rem. Code, § 3000-6, providing that the commissioner of agriculture shall exercise all the powers vested in the state fair commission, the earlier special act was not impliedly repealed by the later general enactment, which transfers the control exactly as it was under the original act.

AGRICULTURE (1)—STATES (23-1)—COLLECTION AND CUSTODY OF FUNDS. Rem. Code, § 5029, requiring each state officer collecting money to transmit the same to the state treasurer each day, did not repeal the prior special act, § 3009, providing that on the last Monday of October of each year, the state fair commissioners shall remit all moneys remaining in their hands, in view of the impossibility of conducting the state fair as a going concern without the application of receipts to the revolving fund provided for by the act.

Application filed in the supreme court January 15, 1920, for a writ of mandamus to compel the commissioner of agriculture to pay certain funds into the state treasury. Granted.

¹Reported in 189 Pac. 1000.

May 1920]

Opinion Per HOLCOMB C. J.

The Attorney General and Glenn J. Fairbrook, Assistant, for relator.

Richards & Fontaine, Davis & Morthland, and Williamson & Luhman, for respondent.

HOLCOMB, C. J.—The relator seeks a writ of mandate to compel the commissioner of agriculture to pay into the state treasury the balance of funds in his possession arising from entrance fees, concessions, advertising space, and other income of the state fair of Washington for the years 1918 and 1919.

In 1893, the legislature created the state fair of Washington and declared its object and purpose to be to promote and further the advancement of all agricultural, stock raising, horticultural, mining, mechanical and industrial pursuits in this state; and provided for exhibitions thereof at North Yakima (now Yakima) for at least six days annually, after the passage of the act. Laws of 1893, ch. 134, page 445. The act further provided that the state fair should be under the management and control of five commissioners known as the state fair commission, to be appointed by the governor with the advice and consent of the senate, and to hold office for four years from the date of their appointment, and until their successors were appointed and qualified. Rem. & Bal. Code, § 3003. It also provided for the organization of the commission within fifteen days after their appointment, and for meetings of the commission at specified times and places, and the giving of bond by each of the commissioners conditioned for the faithful performance of their duties. Rem. & Bal. Code, § 3004. It further provided that the state fair commission should take and have full control and management of the state fair as a state institution and the care of its property, and intrusted the commission with the entire direction of

its business and financial affairs, etc.; and that the commission should have power to charge entrance fees, gate money, lease stalls, stands, restaurant sites, give prizes and premiums, and do all things which by the commission might be considered proper to conduct in connection with a state fair not otherwise prohibited by law. Rem. & Bal. Code, § 3005. Section 3008 provided that, on the last Monday of October of each year, the state fair commission should prepare and transmit to the governor of the state a full financial statement, signed by the president and treasurer and attested by the secretary, of all funds received and disbursed, and also a report signed by the president and secretary of all the assets and liabilities of the state fair, a full and detailed account of all its transactions, statistics and information gained; and required the secretary to constantly collect all kinds of information calculated to instruct the agricultural and industrial classes, and to have the same embodied in such report. Section 3009 provided that all vouchers for the expenditures of money under the provisions of the act should be signed by the president and at least two other members of the state fair commission and attested by the secretary; and that the state auditor should, upon presentation of such vouchers, draw his warrant upon the state treasurer for the payment of the same, and the state treasurer should pay such warrant out of any money on hand appropriated for the purposes in the act set forth; and that all moneys remaining in the hands of the treasurer of the commission on the last Monday of October of each year should be paid in to the state treasurer to the credit of the state fair fund, to be subsequently drawn out as thereinbefore provided. Section 3011 provided that no expenditure should be made or indebtedness contracted by the commissioners in excess of the amount therein appro-

May 1920]

Opinion Per HOLCOMB C. J.

priated, and that any indebtedness so contracted should be void. In 1913, by chapter 60, page 196, Laws of 1913, the legislature created the department of agriculture, and provided, in § 6 thereof, that the commissioner (of agriculture) should have power and it should be his duty, among other things:

“(5) To exercise all the powers and perform all the duties now vested in and required to be performed by the state fair commission.” Rem. Code, § 3000-6.

By § 14 of that act, all acts and parts of acts incorporated in the schedule contained in this section, and all acts and parts of acts in conflict with the provisions thereof, were repealed; and the schedule included, with reference to the state fair legislation, §§ 3003 and 3004, Rem. & Bal. Code, being the sections giving the management and control of the state fair to the five commissioners known as the state fair commission, and providing for their organization, meetings, giving of bonds, etc.

It is shown by the petition that, at the time of the opening of the 1919 state fair, respondent Benson, as commissioner of agriculture, had in his control and custody approximately \$13,000 remaining from the conduct of the fair for the year 1918, and that he received from the income of the 1919 fair approximately \$40,000; that he expended approximately \$38,000 of this amount, and there remains a balance of approximately \$16,000 in his possession at this time. It is the contention of the respondent that he is authorized to expend all income of the state fair for the payment of expenses incurred in its operation, in addition to the amount appropriated by the legislature. The relator, supported by the *Attorney General*, contends that these collections must be deposited in the state treasury to be paid out under proper appropriation acts.

Relator contends that the only language in the act of 1893 creating the state fair which could be construed as permitting the expenditure by the state fair commission of the collections of the operation of the fair, without the same having been paid into the treasury and appropriated by the legislature, are the authorizations of § 3005 for the commission to "do all things which by said commission may be considered proper to conduct in connection with a state fair not otherwise prohibited by law," and § 3009, providing "that all moneys remaining in the hands of the treasurer of the commission on the last Monday of October of each year shall be paid in to the state treasurer to the credit of the state fair fund, to be subsequently drawn out, if required, as hereinbefore provided. . . ."

It is conceded that, since Rem. & Bal. Code, § 3002, permits the holding of the fair as late as the second Monday of October, and the last Monday of October being specified in Rem. & Bal. Code, § 3009, for remitting all moneys remaining in the hands of the treasurer of the commission to the state treasurer to be credited to the state fair fund, to be drawn out as in the original act prescribed, might support that contention but for the fact that, at the time of the enactment of that section, there was not in force Rem. Code, § 5029, requiring each state officer, or other person authorized by law to collect or receive moneys belonging to the state or to any department or institution thereof, to transmit the same to the treasurer of the state each day; and that, further, by the provisions of the act creating the department of agriculture (Rem. Code, § 3000-12), all moneys collected as fees or otherwise by the department of agriculture shall be paid into the state general fund.

The *Attorney General*, upon the request of the Honorable J. H. Perkins, commissioner of agriculture,

May 1920]

Opinion Per HOLCOMB C. J.

in July, 1913, for an opinion as to the operation of the state fair fund, advised the commissioner of agriculture that § 12 of chapter 60, Laws of 1913, p. 200, required all moneys collected by the commissioner to be paid into the state general fund, and that the use of the state fair receipts as a revolving fund was not authorized by law.

Apparently the advice of the *Attorney General* was not followed by the commissioner at that time, and from the allegations in the petition before us, was ignored in 1918 and 1919. But the *Attorney General* contends that, notwithstanding the executive construction of the provisions of the acts in question as creating a state fair revolving fund, the commissioner of agriculture is without authority to so dispose of it under the provisions of §§3000-12 and 5029, Rem. Code.

We grant that we are not to be bound by the construction of the acts in question by the administrative officers, even though for a number of years, and even though it had been approved by the law officers of the state rather than disapproved. *Wendt v. Industrial Insurance Commission*, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790. But we should give some heed to the legislative construction of these prior acts (*Swigart v. Baker*, 229 U. S. 187); and it appears that, even from the time of the creation of the department of agriculture in 1913, at that session and at every subsequent session since, until and including the session of 1919, the legislature has made a separate appropriation to the state fair from the appropriation to the department of agriculture for the maintenance of the institution, payment of salaries, and the like. Neither did the legislature, when creating the department of agriculture, repeal any of the provisions relating to the state fair, save and except those heretofore

mentioned, the creation of the state fair commission and its management; nor is the state fair included in any of the four divisions created within the department of agriculture by the act of 1913. The act of 1913 also specifically provided that the horticultural fund, theretofore existing as a separate revolving fund controlled by the horticultural commissioner, should be paid into the state general fund, and omitted to so provide for the state fair fund. Rem. Code, § 3000-13.

The commissioner of agriculture is, by the act of 1913, creating his department, granted the power and charged with the duty: "To exercise all the powers and perform all the duties now vested in and required to be performed by the state fair commission." And the state fair commission was, by the act creating the state fair of Washington, charged with the duty of promoting and furthering the advancement of all agricultural, stock-raising, horticultural, mining, mechanical and industrial pursuits in this state, and required to provide for an *annual* fair or exhibition, upon the fair grounds owned by the state, of all the industrial products of the state, on dates to be fixed not earlier than the third Monday of September nor later than the second Monday of October of each year, and to continue for at least six days, and to transmit all funds remaining in their hands on the last Monday of October of each year to the state treasurer to the credit of the state fair fund. These provisions are still in force and these duties incumbent upon the state agricultural commissioner instead of the former state fair commission. It is also still incumbent upon the state agricultural commissioner, as manager of the state fair, to care for all the property of that institution and to keep the same in complete and continual repair.

We have uniformly and consistently adhered to the principle that we will adopt that interpretation of

May 1920]

Opinion Per HOLCOMB C. J.

legislation which will give force and effect to the obvious legislative intent; and we have heretofore held that special statutes will not be repealed by general enactments (*State ex rel. Johnson v. Clausen*, 51 Wash. 548, 99 Pac. 743); nor will general enactments apply in the interpretation of special statutes (*State ex rel. Washington Public Service Co. v. Superior Court*, 86 Wash. 155, 149 Pac. 652); and that the functioning of public institutions of the state operating under special statutes is not generally affected by general restrictive laws governing the revenue collecting bureaus of the state. *State ex rel. Johnson v. Clausen, supra*; *State ex rel. Peel v. Clausen*, 94 Wash. 166, 162 Pac. 1; *State ex rel. Sherman v. Pape*, 103 Wash. 319, 174 Pac. 468; *State ex rel. Thompson v. Powell*, 108 Wash. 561, 185 Pac. 573.

In view of these considerations, we conclude that the act of 1893, creating and defining the powers of the state fair commission, is still in force, being a special statute not impliedly repealed by subsequent general enactment, and that the transfer of the control of the state fair to the commissioner of agriculture, by the act of 1913, transfers the control exactly as it was under the original act in the state fair commission, and that the legislature, by its several appropriations, evidenced that such was its intent.

We are satisfied it was not the intention when enacting Rem. Code, § 5029, requiring each state officer or other person authorized by law to collect or receive moneys, to transmit the same to the treasurer of the state each day, to apply the provisions thereof to the operations of the state fair under the special legislation creating and governing it. The lawmakers must have been sensible of the impossibility of operating the state fair as a going business concern and requiring the proceeds of each day to be turned into the state

treasury daily, and were content with the special legislation theretofore in force requiring only that the balance in the hands of the state fair commissioners be turned into the state treasury on the last Monday of October each year.

Our attention has been called to § 1, chapter 8, page 13, Laws of 1907, which reads:

“All moneys now in or that may be paid into the state treasury from any and all sources, except moneys received from taxes levied for specific purposes and excepting the several permanent and irreducible funds of the state, and the moneys derived therefrom, shall be paid into and become a part of the general fund of the state.”

This act, of course, abolishes all such special funds as the state fair fund, but our reasoning in respect to the general legislation concerning the operation of the state fair applies in part also to this statute. While it directs the payment of moneys received from the state fair into the general fund of the state, the other special legislation requiring it only to be done on the last Monday in October of each year is still in force, not being expressly or impliedly repealed.

The biennial appropriations by the legislature for the support of the state fair are to be deemed appropriations in aid of the state fair, together with, and in addition to, the income derived from the operation of each annual fair. The income is to be considered an operating fund, and it, together with the appropriations made by the legislature, is to be accounted for and any balance paid back into the general fund on the last Monday of October of each year. This results in the state fair funds being remitted annually on the last Monday of October, but the appropriation is for the biennium and should be withdrawn as provided by law from the appropriation for the biennium, includ-

May 1920]

Statement of Case.

ing the income of the annual exhibitions, as other biennial appropriations are drawn upon. In other words, while it should be paid into the general fund, it should be paid in to the credit of the state fair, and when required should be drawn upon for the benefit of the state fair, in the same way as other biennial appropriations for any department are drawn upon. We therefore conclude that the writ prayed for by relator should be granted, but the operation of the fund should be as stated herein.

Writ granted.

TOLMAN, BRIDGES, and MOUNT, JJ., concur.

[No. 15560. Department Two. May 12, 1920.]

INA C. BARNES, *Respondent*, v. C. N. BICKLE *et al.*,
Appellants.¹

DAMAGES (52)—LANDLORD AND TENANT (54)—MENTAL SUFFERING—PHYSICAL INVASION. There can be no recovery against a landlord for acts causing mental suffering and distress on the part of the tenant who was sick in a hospital, where there was no physical invasion of the person or acts amounting to an assault.

LANDLORD AND TENANT (54)—DISTURBANCE OF POSSESSION BY LANDLORD—DAMAGES. Where the landlord entered the apartment house, informed lodgers that they were in charge, raised the rent and caused lodgers to vacate, and the tenant was thereafter unable to rent the rooms, there was an invasion of the property for which the landlord would be liable in damages.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 28, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Modified.

S. H. Kellerman, for appellants.

Meyers & Couden, for respondent.

Reported in 189 Pac. 998.

MOUNT, J.—This appeal is from a judgment of the lower court in favor of the plaintiff for \$550, upon two causes of action separately stated in the complaint. The first cause of action is for alleged damages to the person of the plaintiff; the second is for damages to her property.

The principal contention of the appellants is that the trial court erred in refusing to direct a verdict in their favor.

The facts, as alleged in the complaint and proven at the trial, may be briefly stated as follows: In July, 1918, the appellants were the owners of a lodging house, known as the "Alamo Villa," in the city of Seattle. This lodging house was leased to the respondent by a month-to-month tenancy. She had paid her rent for the month of July. On about the 20th of July, she became sick with appendicitis and was required to go to a hospital for an operation. At the time she left her rooming house, she authorized a Mr. and Mrs. Hughes to have general charge thereof; but neither Mr. nor Mrs. Hughes resided in the house. The immediate charge of the rooming house was left with a maid, who cared for the rooms and lived at the house. On about the 24th of July, the maid became ill and invited the appellant Mrs. Bickle to assume charge of the rooming house. Mrs. Bickle took charge that day, took care of the rooms and notified several of the lodgers that she intended to keep the house and that the rent of rooms was to be payable to her. This fact was reported by some person to the respondent, who was in the hospital, and, it is alleged, greatly worried her and damaged her health. Thereafter, on about the 26th day of July, the appellants prepared a notice to the effect that, beginning with the month of August, the rent of the lodging house would be increased from \$150 to \$300 per month. This notice was handed to a

May 1920]

Opinion Per MOUNT, J.

nurse at the hospital with the request that it be delivered to Mrs. Barnes if she was able to receive it. It was delivered to her, and it is alleged that this notice caused her great mental anguish and retarded her recovery. Thereafter, on the first day of August, when the rent for the month of August became due, Mrs. Barnes tendered to the appellants her check for \$150 rent for that month. The appellants at first refused to receive this check, but later in the day did receive it, and, thereafter, on the 6th day of August, after Mrs. Barnes had returned to her lodging house from the hospital, a notice was served upon her, terminating her tenancy on the first day of September following. It is alleged that, at this time, Mr. and Mrs. Bickle created much disturbance in the halls of the lodging house, and attempted to force their way into the room where the respondent was, and that thereby she was severely injured in health. These events are alleged in detail in paragraph five of the first cause of action of the complaint. The sixth paragraph then alleges as follows:

“That the unlawful and malicious acts of said defendants as described in paragraph five herein were calculated to and did cause plaintiff great physical and mental distress, pain and suffering, seriously impairing her general health and postponing her complete recovery from the effects of the operation hereinabove described, and each of said acts contributed to such result. The plaintiff has been thereby damaged in the sum of three thousand dollars (\$3,000).”

It is apparent from the allegations of the complaint, and from the proof in support thereof, that there was no physical invasion of the respondent's person. The gist of the complaint is for physical and mental distress of the respondent caused by the things which she alleges she was informed the appellants did. We think it is plain that the appellants were rightfully at

the lodging house upon the first occasion referred to. They were invited there by the maid, who had actual possession. They no doubt had no right to inform the lodgers that the rents should be paid to the appellants personally. They clearly had a right to serve a notice upon the respondent of their intention to increase the rent; and they had a right to terminate the tenancy by giving proper notice thereof. The notice to increase the rent was insufficient. The only complaint that could be made against the appellants on account of these acts is as to the manner in which the acts were done. And since there was no physical invasion of the respondent's person, her sole claim must necessarily be, as it no doubt is made in the complaint, for physical and mental distress where there was no act amounting to an assault. The respondent relies upon the case of *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436, where we held that mental suffering, resulting from a wrongful act, may be taken into consideration in assessing damages, even though there be no physical injury. But after the decision in that case, in the case of *Corcoran v. Postal Telegraph-Cable Co.*, 80 Wash. 570, 142 Pac. 29, L. R. A. 1915B 522, we had occasion to consider this question again at length; and, after reviewing a large number of cases from other jurisdictions and distinguishing cases from this jurisdiction, especially the *Nordgren* case, we held, in substance, that there could be no recovery for mental and physical distress where there was no invasion of the person or property of the plaintiff. We there said, at page 585:

“To attempt to fix a monetary value as damages for such [mental] suffering would be to enter the realm of speculation, as much today as it would have been fifty or a hundred years ago. The only possible ground upon which such damages could be allowed would be the ground upon which punitive damages are allowed.

May 1920]

Opinion Per MOUNT, J.

This thought is expressed in some degree in some of the decisions we have noticed, but it is worthy of note in this connection that punitive damages are not recoverable in this state even when the injury upon which the claim is rested flows from gross negligence or wilful wrong, except when expressly allowed by statute."

We are of the opinion, therefore, that the trial court should have directed a verdict in favor of the appellants upon the first cause of action.

The second cause of action, as alleged in the complaint and proven upon the trial, is, in substance: that, on or about the 25th day of July, 1918, the appellants wrongfully collected rentals due to the respondent from certain roomers in the lodging house and so conducted themselves that a number of roomers left the lodging house, to the damage of the respondent in the sum of \$110. There was evidence to support these allegations of the complaint, and we are satisfied that this cause of action was properly alleged and, to the extent of the verdict, was proved. The jury, upon this cause of action, found in favor of the respondent for the sum of \$50. There was evidence to the effect that, when the appellants were upon the premises, they stated to the lodgers that they had taken charge of the house and intended to keep charge of it; that the room rent would be increased in certain instances; and that one or two of the occupants, for that reason, vacated their rooms and the respondent was unable thereafter to rent these rooms. Here was an invasion of the property of the respondent, and by reason thereof tenants were driven from the property and actual damages resulted. We think the second cause of action was properly stated and proved.

The appellants argue one or two questions upon the instructions, but our disposition of the first cause of action avoids any necessity of reference thereto.

The judgment appealed from is modified so that the verdict and judgment upon the first cause of action will be set aside, and a judgment entered for \$50 on the second cause of action. The appellants will recover their costs on this appeal.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15584. Department Two. May 12, 1920.]

PEARL JONES, *Respondent*, v. JOHN J. ELLIOTT *et al.*,
Appellants.¹

FRAUD (7, 22)—ACTION—DAMAGES—RELIANCE UPON REPRESENTATIONS—EVIDENCE—SUFFICIENCY. The evidence sustains a verdict for damages from misrepresentations in the trade of lands for a second mortgage, secured upon land of little value, where the character of the land and the responsibility of the makers and indorsers of the note was misrepresented and the plaintiff was persuaded not to inspect the land; and the mere fact that plaintiff made inquiry from other sources does not preclude relief, if the information gained failed to disclose the fraud.

SAME (23-26)—ACTION FOR DAMAGES—MEASURE—INSTRUCTIONS. In an action for fraud in misrepresenting the value of lands traded, it is competent to show the value of the plaintiff's land, in order to show damages and to submit that issue, notwithstanding the measure of damages is the difference between the value of the property received by plaintiff and its value if it had been as represented.

TRIAL (103)—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions in the language proposed, if the substance was given by the court in its own language.

Appeal from a judgment of the superior court for King county, Hall, J., entered March 22, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Affirmed.

McClure & McClure (Walter S. Osborn, of counsel),
for appellants.

Poe & Falknor, for respondent.

¹Reported in 189 Pac. 1007.

May 1920]

Opinion Per FULLERTON, J.

FULLERTON, J.—In this action the respondent, Pearl Parkhurst Jones, recovered against the appellants, Elliott, Collyer-Vilas-Elliott Incorporated, Alfred E. Hart and Katherine S. Hart, in damages for false representation made in an exchange of properties between the respondent and the appellants Hart. The action was tried by the court sitting with a jury, and the appeal is from the judgment entered upon the jury's verdict.

The undisputed facts giving rise to the controversy are, in substance, these:

Some time in the early part of the year 1915, the appellants Hart became the owners of a promissory note secured by a second mortgage on a tract of land containing 19.83 acres, situated in the Methow valley, in Okanogan county. The note and mortgage were executed on July 15, 1914, by one Robert A. Campbell, Nellie E. Campbell, his wife, and one Susan S. Shaw, to the Zener-Hilt Company, by which company the note was indorsed to the Harts. The note was of the face value of \$2,560, matured three years after its date, and provided for annual installments of interest. In April, 1915, the appellants Hart placed the note in the hands of the appellant corporation, a real estate firm, for sale or exchange. On April 25, 1915, the real estate firm caused to be inserted in a morning paper published in the city of Seattle, the following advertisement:

“Wanted: Real Estate. Wanted a bungalow with title or mortgage, nicely situated, for which we will turn in one or two first class second mortgages, where the security is more than twice the combined first and second mortgages. Would like to get action on this immediately. Collyer-Vilas-Elliott Inc.”

The respondent at that time owned certain lots in the city of Seattle on which she had constructed a

dwelling house, which she was desirous of selling. This fact was known to one R. J. Huston, and he, seeing the advertisement, called the respondent's attention to it. A few days later, Mr. Huston and the respondent went to the offices of the real estate firm, where they met the appellant Elliott, who was a member of the firm. They made inquiry of him concerning the mortgaged property, its condition and value, and inquiries concerning the financial responsibility of the makers and the indorser of the note. Mr. Elliott made certain representations concerning the matters of which inquiry was made, and the respondent made known to him the property she desired to sell. Further negotiations were had which terminated in an exchange of the respondent's property for the note and mortgage. The land which the mortgage covered afterwards proved to be of no greater value than the first mortgage which was upon it and was sold in satisfaction of that mortgage. The makers and the indorser of the note also proved financially irresponsible, and the result was that the respondent realized nothing for the property she received, although the property which she exchanged for the note equalled substantially the value put upon it in the exchange.

The respondent recovered on the theory that the representations made to her on behalf of the appellants concerning the character and condition of the mortgaged property and the financial responsibility of the makers and the indorser of the note were false and fraudulent, and that she made the exchange in reliance upon such representations. It is over these questions that the controversy between the parties hinges, the appellants contending that there is not sufficient evidence in the record to support the findings of the jury thereon.

May 1920]

Opinion Per FULLERTON, J.

Concerning these matters, the respondent testified that, at the first meeting with Mr. Elliott, he made the following representations:

"He told us it was a mortgage on a twenty-acre tract up near Twisp, Washington; that this tract was good land; that it was planted to five-year-old trees; that they were almost ready to bear, and that the indorsers of this note, Zener-Hilt Company, was a company in Wenatchee, a corporation doing a prosperous business; that they are worth between forty and fifty thousand dollars; that Mr. Robert A. Campbell on the note had taken it over—had taken this place that this mortgage was on in exchange for a place that he owned in Wenatchee; that it was a good place—a good orchard, and that Mr. Campbell was an orchardist, and was up there living on this place and that Miss Shaw, another indorser on the note and mortgage, was a school teacher back in Fullerton, Nebraska; that she had other property besides being interested with Mr. and Mrs. Campbell in this; that she was making a good salary; that Mr. Campbell was a perfectly reliable man—he had a wealthy father who was backing him in this, and the Dr. Zener of this Zener-Hilt Company was worth fifty or sixty thousand dollars. He told us that this tract was worth between seven and ten thousand dollars, and that there was a perfectly good and ample water right on the place."

Concerning a second meeting with him, she testified:

"I had been thinking a good deal about the deal and I felt that I should go up and see the property and I went back to Mr. Elliott's office, hoping that he would encourage me to go and see it. He told me that there was absolutely no question about the backers of that note; I don't need to worry a bit about them, and that I would never get the land; that I didn't need to go and look at it, I wouldn't know whether it was a good orchard if I did go and look at it, and that people often made deals where they didn't go to look at the land; that the Harts had made a much bigger deal than mine when they took over these mortgages, and that they had relied on his word.

"I absolutely believed these representations made by Mr. Elliott, for I had known Mr. Elliott for ten or twelve years, and considered him one of the finest young men in Seattle. I certainly would not have made this exchange, except for the representations made to me by Mr. Elliott.

"He told me again and again that there was absolutely no question about the backers of this note. That this corporation; that Dr. Zener himself was worth from fifty to sixty thousand dollars, and that Mr. Campbell was backed by a rich father, and that Mr. Campbell was able to pay, and that Mr. Campbell had traded a good property for it; he had traded a mortgaged property for it, but he didn't tell me that. He didn't tell me that he didn't know Mr. Campbell. He didn't say that he was familiar personally with the affairs of the Zener-Hilt Company, but he did say that it was a wealthy corporation, doing a flourishing business and worth from forty to fifty thousand dollars. I did not know that what Mr. Elliott said to me in regard to these people was based upon information that he had from others. It came as straight facts from John Elliott; he didn't say that somebody else said so; he said those things and made those statements to me. I didn't know that he had not seen the land."

Mr. Huston testified to the representations of Mr. Elliott as follows:

"He told us that it was a twenty-acre tract planted to trees; that the trees were five years old, in a first-class condition, with ample water right; that it was in the Methow valley, and that the soil was first-class soil, volcanic ash soil. He said that the value of the land was from seven to ten thousand dollars, but subsequently in his written statement, his estimate was from seven to eight thousand dollars, but his talk was from seven to ten thousand dollars until that written statement was made. He told us about the responsibility of the makers and indorsers of the note; that was a very strong point with him. He said that the makers, Mr. Campbell and his wife, were perfectly

May 1920]

Opinion Per FULLERTON, J.

good; that Mr. Campbell was an expert orchardist; that he had traded his home for this place in Wenatchee, calculating to make this place his home; that he himself was perfectly good, and that the other maker of the note, Miss Shaw, was a school teacher, was drawing a good salary, and amply able to meet her share of it, and that Mr. Campbell also had backing, his father, he said, was perfectly good, and that there never would be any question about the payment of that mortgage. He said the Zener-Hilt Company was a rich concern over there worth forty or fifty thousand dollars. I said to him then, 'Your best plan will be, so that we will know what we are doing, for you to make out a written statement as to what you are willing to do with her, make out a written statement as to the exchange you are willing to make.'

"There never was any representation by Mr. Elliott that he was getting any of his information second hand. He represented these facts as coming from himself, as everything being first-class. He didn't say that Dr. Zener or any other person said anything about this property in describing the character of the land, or the trees, or the water right, or anything else. It came directly from Mr. Elliott as information belonging to and within his own mind. He never said anything to us in any of these conversations that he had never been over in eastern Washington and had never seen this land."

The writing he handed them in response to Mr. Huston's suggestion was, in part, as follows:

"Note No. 1 for \$2,560, as per enclosed copy is dated July 15th, 1914, payable July, 1917, made and executed by Robert E. Campbell, Nellie A. Campbell, his wife, who are now living on the farm, and Susan S. Shaw, spinster, a school teacher of Fullerton, Neb. This note is secured by a mortgage, which mortgage is of record in the county of Okanogan, state of Washington, pages 10 and 11, book U of the records of said county, and covers 19.83 acres in five year old trees, with house, barn and other improvements, which tract of ground is located two miles from the town of Twisp,

and more particularly described as follows, to wit: This mortgage is second to a mortgage of \$1,600 owned by the Oregon Mortgage Company of Portland, Oregon, due in 1919, or 2½ years after the second mortgage above referred to is due. This property transferred on a basis of \$10,000, but is probably worth \$7,000 to \$8,000."

The value of the land lay in the fact that it was suitable for growing an orchard and that it had upon it at the time a flourishing orchard. There was abundant evidence in the record from which the jury could find that the land was unsuitable for orchard purposes; that all of it, save about four acres, was gravelly, covered in part with boulders, and incapable of growing fruit trees of any sort; and that the major portion of the orchard trees that had been originally set out on the tract had died, and that the remainder were stunted and of but little value. There was evidence, also, that the makers of the note owned nothing except this property, and that the indorser of the note was insolvent. There was evidence, it is true, contradictory of this testimony, and Mr. Elliott, particularly, testified that he made no representation as of his own knowledge concerning the matters; that he distinctly told the respondent that he knew nothing of these matters personally, but was merely reciting the conditions as they had been represented to him. He testified, also, that he advised the respondent to make an investigation for herself and not rely upon anything he had said.

But there was here, nevertheless, substantial evidence sufficient to sustain the verdict, and this is as far as we are permitted to inquire. It is not our province to interfere with the verdict of the jury, even though we might find, were we the triers of the facts, that the preponderance of the evidence was with the appellants.

May 1920]

Opinion Per FULLETON, J.

The respondent, prior to consenting to the exchange, made inquiries from other parties concerning the value of the land, and from this fact the appellants argue that she cannot now be heard to say that she relied in making the exchange upon their representations. But this fact is not conclusive of the question. While the information she received was not as favorable as the representations she testified the appellants made, still it was not of such a nature that the court can say, as matter of law, she should have mistrusted the truth of the appellants' representations. The inquiries, moreover, related to the value of the land; she made no inquiry concerning the financial responsibility of the persons obligated on the note.

It is not the rule that inquiry from other sources alone will preclude reliance on the representations of the vendor. To work such an end, the information gained must have been such as to lead a reasonably prudent person to believe that the vendor's representations were false. As we said in *Eyers v. Burbank Co.*, 97 Wash. 220, 166 Pac. 656:

"It matters not, it has been well declared, that a person misled may be said in some loose sense to have been negligent, for it is not just that a man who has deceived another shall be permitted to say to him, 'You ought not to have believed or trusted me,' or 'You were yourself guilty of negligence.' This indeed appears to be true, even of cases in which the injured party had in fact made a partial examination. That is the effect of the decisions, also, in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Strand v. Griffith*, 97 Fed. 854; *George v. Kurdy*, 92 Wash. 277, 158 Pac. 965; and *Miller v. Gerry*, 81 Wash. 217, 142 Pac. 668."

So in 12 R. C. L. 357, 358, it is said:

"But the mere fact that one makes an independent investigation or examination, or consults with others,

does not necessarily show that he relied on his own judgment, or on the information so gained, rather than on the representations of the other party, nor does it give rise to a presumption of law to that effect. If under the circumstances he was unable to learn the truth from such examination or investigation or without fault on his part did not learn it, and in fact relied on the representations, then he is entitled to relief."

The court, in its charge to the jury, when stating the issues, used the following language:

"The plaintiff charges that the Hillman addition property [the property given in exchange for the note] was at the time worth the sum of \$3,500, subject to an outstanding mortgage of \$950, and an assessment of something less than \$200, the amount of which is specified in the complaint."

The appellants complain of this statement because, as it is contended, it suggests a false issue to the jury. It is argued that the measure of damages is the difference between the actual value of the note received in exchange for her property and its value had it been as represented, and hence it was of no concern to the jury what value the respondent may have given for the note. But we think the criticism unfounded. The court elsewhere gave to the jury the correct instructions for measuring the damages, and elsewhere correctly charged them, also, that the issue to be determined by them was

"whether there was practiced upon the plaintiff such fraud as is charged in the complaint, and whether, if so, the plaintiff has sustained any financial loss in consequence,"

thereof. Since the gravamen of the action is damages, it is manifest that there could be no recovery unless the respondent had suffered damages, and it is equally manifest that she could have suffered no damages unless she gave value for the note. Hence, on this branch

May 1920]

Opinion Per FULLERTON, J.

of the case, it was competent, if not necessary, to show the value of the property the respondent parted with in the exchange, and hence proper to submit to the jury the question whether the property given in exchange had value. The court did no more than this, and we cannot conclude that it committed error in so doing.

The appellants further complain of the refusal of the court to give certain requested instructions. Some of these, if not all of them, could properly have been given in the language in which they were couched. But the court chose to charge the jury, for the greater part, in its own language. In so doing it clearly and distinctly stated the issues and the facts necessary for the jury to find in order to find for the respondent, in as favorable a light to the appellants as the facts warranted. We cannot, therefore, find error on this branch of the case.

Other errors assigned require no special mention.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 15636. *En Banc*. May 12, 1920.]

LOUIS H. MOORE, *State Bank Examiner, on Behalf
of the German-American Mercantile Bank,
Appellant*, v. AMERICAN SAVINGS BANK
& TRUST COMPANY, *Respondent*.¹

BANKS AND BANKING (41)—CLEARING HOUSE ASSOCIATIONS—RULES AS PART OF CONTRACT. Where nonmembers of a clearing house association must consent to be governed by the rules of the association in order to obtain benefits of its contract with a member to clear its checks, the rules of the association are a part of the contract.

SAME (41)—CLEARING HOUSE ASSOCIATIONS—CONTRACTS—LIABILITY ON CHECKS OF NON-MEMBER RULES. Under the rules of a clearing house association making a member liable for all checks cleared for a nonmember until delivery of a written notice of discontinuance of the agency, such member is liable to the other members on the checks of a nonmember paid by the other members prior to the receipt of notice of discontinuance; and it is immaterial whether the liability be discharged by payment direct to the other members or to the clearing house association for their benefit.

SAME. In such a case, a rule of the association making checks the property of the member presenting the same until paid or "returned," does not authorize the discharge of the liability by a return of good checks regular on their face; since the return of such checks unpaid would be in direct violation of the spirit and rules of the association.

SAME. The liability of a member of a clearing house association on checks cleared for a nonmember under rules making it liable until written notice of discontinuance of the agency, is not a liability *in futuro*, attaching after insolvency of the nonmember, where the checks were taken by the other members before notice of the discontinuance, and the day before the nonmember closed its doors for the transaction of business; and hence the same is not violative of the trust fund theory as declared by Rem. Code, § 3303-2, providing that no bank or association shall have a lien or charge for any advance or clearance or liability incurred, against the assets of any bank or business whose property or business has been taken over by the state bank examiner.

SAME. In such a case the taking of security from the nonmember to indemnify the member from loss, is not an unlawful preference of a creditor or the creating of any lien by payment made or

¹Reported in 189 Pac. 1010.

May 1920]

Opinion Per BRIDGES, J.

"liability incurred" after insolvency, notwithstanding payment of the clearances was not made until after insolvency; since the legal debt and lien was created the moment the member's liability became fixed on the day before the bank examiner took possession.

SAME. In such a case, moneys and securities deposited by the nonmember to be used by the member clearing its checks, do not create merely a guaranty or lien that could in any sense be a violation of the statute or the trust fund theory.

SAME. A nonmember of a clearing house association that has deposited money and securities with a member as a guaranty and to secure the benefit of having its checks cleared for it, cannot set up the defense of *ultra vires*, where it was impossible to put the parties in *statu quo*.

HOLCOMB, C. J., FULLERTON, MITCHELL and MACKINTOSH, JJ., dissent.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 8, 1918, in favor of defendant, in an action by the state bank examiner on behalf of an insolvent bank, after a trial on the merits to the court. Affirmed.

M. M. Richardson and *Hugh C. Todd*, for appellant.

John H. Powell and *Farrell, Kane & Stratton*, for respondent.

BRIDGES, J.—This was a suit by the appellant, as state bank examiner, on behalf of the German-American Mercantile Bank, of Seattle, an insolvent corporation, to recover of the respondent certain cash and securities which the German-American Mercantile Bank had, theretofore placed in the possession of the respondent.

The Seattle Clearing House is a voluntary association composed of certain, but not all, of the banking institutions in the city of Seattle. The chief purpose of the clearing house is "the effecting at one place of daily exchanges between members." In the transaction of business each bank in the city would receive and pay checks drawn on many or all of the other

banks, and but for the clearing house it would be necessary that each day a representative of each bank personally visit each other bank, taking to it checks drawn upon it. To avoid this, representatives of the members of the clearing house meet at a designated place and at designated hours each business day and exchange checks or other items. Many of the banks in Seattle were not eligible to become, and were not, members of the clearing house. Its rules made provision, however, whereby nonmembers might obtain its benefits. If any such nonmember should so desire, it must act through some member. In other words, a member of the clearing house may clear checks and other items for a nonmember. Article 2 of the clearing house rules covers this subject, and provides that any member may clear for any nonmember only after obtaining the consent of the clearing house committee and paying a certain sum. The member desiring to clear for a nonmember must make a certain showing concerning the financial standing of the nonmember. The latter must consent to be governed by the rules and regulations of the association. This rule further provides as follows:

“Said member shall be liable to the clearing house for all checks and other clearing-house matter upon such non-member, the same as for its own transactions, and its liabilities shall continue until the delivery to each member of the association of a written notice of the discontinuance of such agency, and the clearing member may demand, and shall receive, from each of the other members of the association, a written list of all items then held by them for which the clearing member shall be liable. . . .”

Prior to January 31, 1917, the German-American Mercantile Bank, being a nonmember of the clearing house, made arrangements to clear through the re-

May 1920]

Opinion Per BRIDGES, J.

spondent. The agreement between the two banks was correctly expressed by one of the witnesses as follows:

"The agreement between our bank [German-American Bank] and Mr. Gleason's bank [the respondent] in 1914 was that they would clear for us and that we would deposit with them securities to the approximate amount of fifty thousand dollars and maintain with them a balance of approximately fifty thousand dollars in cash at all times.

"The securities that were delivered over were delivered over to protect them against any possibility of any loss through their having agreed to act as clearing-house agent for us. . . . In other words, that money was put up for the purpose of indemnifying the American Savings Bank & Trust Company against any loss which was occasioned to it by the payment of any checks which were drawn upon our bank and which passed through the clearing house, and which were paid by the American Savings Bank & Trust Company."

This arrangement was originally made in 1914. Later, however, the clearing house, in a sense, dissolved; but it at once reorganized, with certain different members, and continued business under substantially the same rules and regulations that had theretofore existed. The clearing arrangements between the two banks continued without interruption and as though there had been no dissolution. On January 31, 1917, at ten o'clock a. m., the German-American Mercantile Bank went into the hands of the state bank examiner for the purpose of being liquidated, it appearing at that time that the bank was insolvent, of which fact the respondent received immediate notice. On the date last named, the German-American Mercantile Bank had with the respondent, in compliance with its clearing agreement, \$14,849.22 in cash, and securities the face value of which was \$51,763.40. About three-thirty o'clock in the afternoon

of January the 30th, the respondent gave written notice to the other members of the clearing house that it would no longer clear for the German-American Mercantile Bank. Many checks drawn on the German-American Mercantile Bank had been received and cashed by the various members of the clearing house during January the 30th and previous to the time they received the respondent's notice that it would cease to clear for that bank. During the day of January the 31st, and after the bank examiner had taken possession of the German-American Mercantile Bank, the respondent paid to these banks, through the clearing house, the amount of these checks in the sum of \$61,651.82. Later the bank examiner brought this suit to recover of the respondent the cash and securities of the German-American Mercantile Bank held by the respondent when the German-American Mercantile Bank became insolvent. There was a judgment for the respondent, and the bank examiner has appealed.

The respondent claims the right to hold the cash and securities to protect itself against the checks of the insolvent bank which it paid on January the 31st in the sum of \$61,651.82. There is no charge of fraud or overreaching involved. The case presents some important and difficult questions. It has been ably briefed and argued.

It is first contended by the appellant that the respondent was not legally obligated to pay the checks or the other items making up the sixty-odd thousand dollars, and consequently is not entitled to hold the cash and securities for protection. On the other hand, the respondent contends that it was legally liable for such amount and was required to pay it. It is plain that the contract was a tripartite one, being between the respondent, the German-American Mercantile Bank and the clearing house. It is also clear that the various

May 1920]

Opinion Per BRIDGES, J.

rules and regulations of the clearing house became a part of that contract, and the latter must be interpreted in the light of those rules. It is conceded that the checks, the payment of which is involved in this suit, were in the hands of the various member banks at the time the respondent gave notice terminating its clearing arrangements with the German-American Mercantile Bank. If the respondent was legally obligated to pay those checks, then it would be entitled to reimburse itself out of funds and securities it holds belonging to the German-American Mercantile Bank, unless it should be found that, for other reasons, which will later be discussed, such contract is void and unenforceable; otherwise it would be required to surrender the same to the bank examiner. It therefore becomes necessary to determine whether the respondent was legally obligated to pay the checks mentioned. We think it was so obligated. One of the rules of the clearing house, which became a part of the contract which we are discussing, provided that the member clearing for the nonmember

“shall be liable to the clearing house for all checks . . . upon such non-member the same as for its own transactions, and its liabilities shall continue until the delivery to each member . . . of a written notice of the discontinuance of such agency, and the clearing-house member may demand . . . from each of the other members . . . a list of all items then held by them for which the clearing member shall be liable, . . .”

The liability of the respondent to the other members of the association to pay any and all checks which they might receive, drawn on the German-American Mercantile Bank, was a part of the obligation imposed upon it for the privilege of acting as clearing agent for that bank. Checks drawn on the German-American

Mercantile Bank were received and cashed by the members of the association as though they were checks drawn against the respondent. As to such checks, the other members were relieved of all responsibility. In the transaction they did not know the German-American Mercantile Bank. This rule expressly makes the respondent liable to pay checks drawn on the non-member and cashed by the members, and provides a way of terminating such liability. The words are clear and specific. The testimony shows that it has been from time to time so interpreted and construed by the members of the association. It has always been considered that the member clearing for a nonmember is liable to the other members for the checks of the latter. In this very instance the respondent objected to paying the checks in question here and argued to the members of the clearing house that it was not legally bound to pay them. But they were unanimous in the opinion that the respondent was bound to pay those checks. The German-American Mercantile Bank, when it made the clearing house arrangements with the respondent, must have so understood and interpreted the rule; otherwise, why did it put up securities and cash to the respondent, "for the purpose of indemnifying" it "against any loss which was occasioned to it by the payment of any checks which were drawn on our bank"?

But appellant argues that, if the respondent was liable to pay these checks, it was liable only to the clearing house and not to its various members. It seems to us this is a distinction without a substantial difference. The clearing house was nothing more than the members which constituted it. It was not a corporation; it was not a copartnership; it had no legal separate being. A contract with it was a contract with and for the use and benefit of its several members, any

May 1920]

Opinion Per BRIDGES, J.

one of whom could, to the extent of its interest, enforce it. The real question, it seems to us, is: Was the respondent liable to pay these checks? and not whether the rule provided that it should pay them directly to the various members of the clearing house, or indirectly to them through that institution. But the appellant contends that, while section 5 of article 2 of the rules, which we have quoted, may, when taken alone, indicate a liability to pay these checks, yet that section must be read in connection with section 2 of article 3 of the rules, which provides that,

“all checks and vouchers received by any member in the exchanges . . . shall remain the property of the members who presented the same respectively at the clearing house, and shall be held in trust only by the members so receiving the same until returned or the amount thereof actually paid to the members who presented the same . . . Should any member fail to pay on demand the balance due, all checks or vouchers received in the exchanges of that day by the defaulting party shall be returned . . . to the clearing house . . .”

It is contended by the appellant that this section authorized the respondent to either pay or to return the checks at its option, and that consequently there was no legal liability to pay. We think the appellant has misconstrued this section of the rules. It has reference only to returning checks which for some reason were not good, such as because the same were irregular on their face, or were forged, or the funds had been previously garnished, or because of some other similar irregularity or reason. It does not mean that a solvent member of the clearing house may return checks against which there are no equities and no defenses, and which it was liable to pay. Other rules refer to irregular checks such as we have mentioned, and section 5 of article 2 of the rules has reference

to such class of checks. The rule makes respondent liable for "good" checks drawn against the German-American Mercantile Bank, as it would be liable for its own checks; and to permit it to return such checks unpaid would be in direct violation of the spirit of the association and its rules. Such an act by the respondent would be equal to a repudiation of its own paper and an act of insolvency which would at once close its doors. We hold that the respondent was not only morally, but legally bound to the clearing house and its members to pay the checks involved in this case, and that, when it paid them, it did only that which its contract bound and required it to do.

But the appellant contends that, if the contract is to be given this construction, then it is void and unenforceable in this instance, because violative of the trust fund theory of insolvent corporations and in direct opposition to section 2, chapter 98, Laws of 1915, p. 280 (Rem. Code, § 3303-2). That section provides as follows:

"No bank, trust company, association or individual knowing that the state bank examiner has taken possession of such bank or trust company shall have a lien or charge for any payment advanced or any clearance thereafter made, or liability thereafter incurred, against any of the assets of the bank or trust company of whose property and business the state bank examiner shall have taken possession."

It seems to be conceded that this statute embraces the trust fund theory developed by the decisions of this and other courts. Plainly, it prohibits a lien for (1) a payment advanced after insolvency; (2) a clearance made after insolvency; and (3) a liability incurred after insolvency. This statute is but a legislative expression of the trust fund theory. Its purpose is to hold the funds of an insolvent corporation for all the

May 1920]

Opinion Per BRIDGES, J.

creditors; to prohibit the preferences which an insolvent individual may lawfully give. The appellant asserts that whatever liability might exist under the contract was a liability *in futuro*; that the rights of all persons must be determined according to the facts, rights and liabilities as they exist at the moment the bank goes into the hands of the examiner; and that at that moment the respondent had no lien, because it had made no payment, and that it could not pay after insolvency and thereby create a lien, because such would violate the statute. It is clear, we think, that the respondent's liability to pay these checks had been incurred prior to insolvency. Under the rules of the association, its liability to pay existed from the moment it began to clear for the German-American Mercantile Bank, down to the moment it gave notice terminating that arrangement. All the checks involved were received by the other member banks before this notice was given and before the German-American Mercantile Bank closed its doors for business. Doubtless, under the rules and under the custom and practice, the respondent might have paid these checks at the time it gave the notice terminating the clearing arrangement; and if it had so done, such act would not have violated any provision of the statute, because both the liability would have been incurred and the payment made before the act of insolvency. Is it possible, therefore, that, because the respondent did not pay the obligation it has incurred the moment it was due, but paid it the next day, this is a violation of the terms of the statute? This would seem to be splitting hairs. The German-American Mercantile Bank, when it was solvent, had a right to make a contract to clear its checks and other items through the respondent; and it had a right at that time to put up to the respondent collateral security to indemnify the latter against any

loss. What is there, then, in the statute, or in the doctrine of the trust fund theory, which would make this contract, valid when made, void simply because the German-American Mercantile Bank had become insolvent, and simply because circumstances had arisen where the respondent had need of the security and its protection? That the respondent's liability as to amount, time payable, and to whom payable, became fixed and was "incurred" the day before the bank closed its doors, we think is unquestioned. But it is said the payment was not made until after the insolvency, and therefore the lien mentioned by the statute was not created until after insolvency. We do not agree with this proposition. If the lien was not created in 1914, when the contract was made, certainly it attached the moment respondent's liability became fixed—which was the day before the examiner took possession. The legal debt of the respondent, its immediate liability to pay it, and the creation of the lien were simultaneous. We do not find in this situation any unlawful preference of creditors or any creating of a lien by "payment" made or liability "incurred" after insolvency. The insolvency of the bank and the taking possession by the examiner could not destroy nor affect this lien. He would take possession of the bank subject to all equities and rights existing in any one else. In 34 Cyc. at page 193, it is said:

"The general rule is that a receiver takes the property of which he has been appointed in the same plight and condition and subject to the same equities and liens as he finds it in the hands of the person or corporation out of whose possession it is taken."

In 23 R. C. L., at page 56, it is said:

"A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, prior-

May 1920]

Opinion Per BRIDGES, J.

ities, and equities existing at the time of his appointment. He becomes merely the assignee of the insolvent, and has exactly the same rights."

Practically all of the questions involved in this litigation were involved in the cases of *O'Brien v. Grant*, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361; and *Davenport v. National Bank of Commerce*, 127 App. Div. 391, 112 N. Y. Supp. 291, 88 N. E. 1117. We will not extend this opinion by reciting the facts in either of those cases, because they are almost identical with those here. In the *O'Brien* case, the St. Nicholas Bank, a member of the New York clearing house, was clearing for the Madison Square Bank, which was a nonmember. The same kind of a suit was brought there as here, and for the same purpose. The court said:

"The members of the Clearing-House Association, in extending to the Madison Square Bank the right to have its checks cleared and paid through one of its members, were assured that all checks presented would be paid up to, and including, the day following the giving of notice by the St. Nicholas Bank of the termination of the arrangement between itself and the Madison Square Bank. . . . That agreement provided for the length of its duration, for the maintenance at all times of the stipulated security to protect the St. Nicholas Bank, and bound that bank to receive and pay the checks drawn upon the Madison Square Bank as it would its own. . . ."

The court further held that there would not be any unlawful preference and that such a contract would not violate any trust fund rule.

In the *Davenport* case, the Bank of Staten Island was clearing through the National Bank of Commerce. The court said:

"The plaintiff contends that the defendant ought not to have paid any of the checks that were presented

to it; that its officers had knowledge of the taking of possession by the superintendent of banks the day before. Hence it paid with knowledge that thereby the drawers of the checks would obtain a preference over other depositors, . . . So far as the defendant was concerned, it had in fact no choice. It was a member of the clearing house association. As such, it had bound itself to pay all checks of the Bank of Staten Island, or any other non-member bank for which it cleared, until after the exchanges of the morning following a notice that it would not longer clear for such bank. . . . And it had no more right, in view of its engagements with its associate members in the clearing house association to refuse to pay checks presented in the clearing house on the morning following the giving of the notice, than it had to refuse to pay checks drawn upon it by its depositors. In paying the checks, therefore, it did only what it was bound to do and could be compelled to do."

The case has been briefed and argued solely upon the theory that the respondent had guaranteed to the member banks the payment of checks paid by them and drawn on the German-American Mercantile Bank, and that it was to have a lien on the funds and securities to protect it under its guaranty. But it may well be doubted whether there is in the case any question of guaranty or lien. Under the rules, the members did not know the German-American Mercantile Bank. Checks drawn against it were, in effect, checks drawn against the respondent. The respondent was to pay, not guarantee, checks drawn against the German-American Mercantile Bank and cashed by the other banks. In this manner the money and securities deposited with the respondent were to be used to make those payments. In other words, the respondent was to pay these checks out of the money deposited with it, and if there was at any time not sufficient money for that purpose, the securities could be converted

May 1920]

Opinion Per BRIDGES, J.

into cash. Under this theory, the statute and trust fund theory would be inapplicable. This theory of the case was adopted in the case of *Davenport v. National Bank of Commerce*, *supra*, where it was said:

“The legal effect of those agreements, as well as the one under consideration, was to require the member bank clearing for said Bank of Staten Island to pay all the checks drawn upon the latter when presented through the clearing house. . . . On the other hand, the agreement in legal effect authorized the clearing bank to use the moneys deposited in pursuance of it to meet such checks, and in addition, to collect or sell the bills receivable or other collateral when necessary to pay the checks redeemed by it that were in excess of the amount of moneys on deposit.”

Whatever view we may take seems to lead to the conclusion that the respondent has a right to protect itself out of the moneys and securities deposited with it.

It is contended, however, that the German-American Mercantile Bank had no right or authority under its charter to put up with the respondent cash and collateral security, and thus deprive its creditors of some of its assets; and that such act was *ultra vires*. Many cases are cited by the appellant in support of this argument, and it must be said that, apparently, some of them do support it. But such is not the rule in this state. Under the facts in this case, it is clearly immaterial whether the German-American Mercantile Bank exceeded its powers in putting up cash and collateral security to the respondent, and whether that act was or was not *ultra vires*. The fact still remains that that bank desired to obtain the benefits which would flow to it as a result of having its business pass through the Seattle clearing house, and in order to obtain these benefits actually put up the cash and collateral security and maintained it for a number of years, and received

the benefits which it sought; and the respondent has been compelled to pay, and has paid, the penalty for having cleared for it. The parties cannot be put *in statu quo*. Under these circumstances, this court will not permit the bank examiner to successfully defend on the doctrine of *ultra vires*. In the case of *Creditors Claim & Adjustment Co. v. Northwest Loan & Trust Co.*, 81 Wash. 247, 142 Pac. 670, Ann. Cas. 1916D 551, L. R. A. 1917A 737, the facts were the following: Certain customers of the respondent bank desired to purchase certain material. The seller of the material required some guaranty of payment. The bank furnished this guaranty. Later, it was sued thereon. It was claimed by the bank that it had no authority under the statute to guarantee the payment of the account, and that its act was *ultra vires*; but this court, speaking through Judge Morris, said:

“The defense of *ultra vires* is one with which the courts have had much trouble in attempting to compel some corporations to live up to their contracts, and much has been said that is hard to reconcile. Many cases, among which may be classed those from this state, have refused to recognize this defense, where the contract has been fully executed and where in its performance one party has received and retained a benefit or the other has suffered a detriment and cannot be placed *in statu quo*.”

The court reviews many of the authorities and quotes with approval the following from *State Board of Agriculture v. Citizens' St. R. Co.*, 47 Ind. 407, 17 Am. Rep. 702:

“Although there may be a defect of power in the corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise, and in execu-

May 1920] Dissenting Opinion Per HOLCOMB, C. J.

tion of the contract, to accept money and perform his part thereof, the corporation is liable on the contract'."

Such has been the accepted doctrine of this court almost from its beginning, and we think such doctrine is wholesome and should be enlarged, rather than contracted.

Judgment affirmed.

TOLMAN, PARKER, MOUNT, and MAIN, JJ., concur.

HOLCOMB, C. J. (dissenting).—We dissent. The effect of this decision is to render the rules and operations of the Seattle Clearing House Association superior to the provisions of section 2, chapter 98, page 280, Laws of 1915 (Rem. Code, § 3303-2), and virtually to nullify that statute. It would appear to have been the manifest intent of the legislature to comprehend just such a situation as this. If not, there was small benefit to be derived from the statute.

By the agreement between the nonmember bank and the member bank and the clearing house rules, the trust fund law of this state and the positive statutes for the regulation of banking business and the protection of creditors generally of insolvent banks are completely evaded and overridden. Such inconsistency in the law is indefensible.

Nor do we think the New York cases (*O'Brien v. Grant*, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361; *O'Brien v. East River Bridge Co.*, 161 N. Y. 539, 56 N. E. 74; and *Davenport v. National Bank of Commerce*, 127 App. Div. 391, 112 N. Y. Supp. 291, 88 N. E. 1117) are exactly parallel as construing precisely such statutory provisions as ours, no such identical statutory terms being quoted or referred to in the opinions. If so, however, we are unable to concur with those decisions. In those decisions a statute of New York was

quoted in the *O'Brien* cases and referred to in the *Davenport* case, forbidding the assignment or transfer of any property "when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation." But our statute provides that:

"*No bank, trust company, association or individual knowing that the state bank examiner has taken possession of such bank or trust company shall have a lien or charge for any payment advanced or any clearance thereafter made, or liability thereafter incurred, against any of the assets of the bank or trust company of whose property and business the state bank examiner shall have taken possession.*" Rem. Code, § 3303-2.

We have italicized the terms of our statute which compel us to conclude that it controls in such case as this, notwithstanding the clearing house association rules, and notwithstanding the New York decisions. There, *intent to prefer* creditors was an essential element prohibited. Here, intent is immaterial. Manifestly, by the majority opinion, either a lien is impressed upon the fund deposited by the nonmember bank with the clearing house bank, under their contract and the association rules, or an indemnity allowed for "*any payment advanced,*" or "*clearance thereafter made, or liability thereafter incurred.*"

Nor do we agree with the observations made respecting the lack of application of the principle of *ultra vires*. We doubt if it is necessarily involved; but, at any rate, while, under the case cited and another which might have been cited, *United States Fidelity & Guaranty Co. v. Cascade Const. Co.*, 106 Wash. 478, 180 Pac. 463, the corporation itself probably should not be permitted to invoke that principle, others, who were

May 1920]

Opinion Per MOUNT, J.

not parties to the corporate act, especially creditors, certainly would be permitted to do so.

The judgment should be reversed.

FULLETON, MITCHELL, and MACKINTOSH, JJ., concur with HOLCOMB, C. J.

[No. 15599. Department Two. May 13, 1920.]

EDNA C. TIBBETTS, *Respondent*, v. BUSH & LANE PIANO COMPANY, *Appellant*, A. SIMONSEN *et al.*,
Defendants.¹

EXECUTION (60, 61)—RIGHTS PASSING TO PURCHASER—LIENS. An execution purchaser of mortgaged premises succeeds to all the rights of the mortgagors and is entitled to pay interest until the date of maturity to avoid a foreclosure of the mortgage.

MORTGAGES (138)—RIGHT TO FORECLOSE—MATURITY OF DEBT—DEFAULT DEMANDING OPPORTUNITY TO PAY. An execution purchaser, succeeding to all the interests of the mortgagors, is entitled to pay interest until maturity; and a foreclosure prior to maturity is premature, where, upon diligent demand, the mortgagee refused to give the purchaser an opportunity to pay the interest due, since there was then no default.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered June 30, 1919, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Reversed.

Charles E. Congleton (*Thos. R. Waters* and *Lester Whitmore*, of counsel), for appellant.

C. H. Hurlbut, for respondent.

MOUNT, J.—This appeal is from a decree of the lower court foreclosing a real estate mortgage.

There is no substantial conflict upon the facts, and they may be briefly stated as follows: On October 15,

¹Reported in 189 Pac. 996.

1917, A. Simonsen and wife executed and delivered to Frank E. White their promissory note for \$2,000. This note was made payable "five years after date," with interest at the rate of seven per cent per annum, payable semi-annually at the office of J. G. Hull & Company, Bellingham, Washington. In order to secure the payment of this note, Simonsen and wife executed to Mr. White the mortgage which is the basis of this action. This mortgage was duly recorded. The mortgage and note provided that, if any interest should remain unpaid for thirty days after due, the principal note should become due and payable at once, without notice. The mortgage also provided that, if the mortgagors failed to pay the taxes and assessments against the property, the mortgagee was authorized to declare the whole amount secured by the mortgage at once due and payable. Thereafter the respondent became the owner of the note and mortgage by assignment from Mr. White. This assignment was not recorded until after this action was begun. After the mortgage was made and recorded, a judgment was obtained by the Bush & Lane Piano Company against Simonsen and wife. The mortgaged property was sold under execution, subject to the mortgage. The piano company was the purchaser at that sale. The first semi-annual interest payment under the note and mortgage had been paid by Simonsen and wife; but before October 15, 1918, when the next payment became due, the Bush & Lane Piano Company, through an agent, interviewed Mrs. Simonsen and was informed that the Simonsens did not intend to pay further interest upon the note and mortgage. On November the 1st of that year, Mr. Congleton, representing the Bush & Lane Piano Company, wrote a letter to Mr. Hull, who represented the respondent, stating that the piano company did not want any foreclosure proceedings,

May 1920]

Opinion Per MOUNT, J.

“ . . . and if you will write me the amount of the interest due on the mortgage I will take up with my client the matter of paying the interest. If there are any overdue taxes I would like to know the amount, for it does not look as though the Simonsens expect to redeem the property from the mortgage.”

On November the 9th, in answer to this letter, Mr. Hull stated, in substance, that the holder of the note intended to foreclose the mortgage; that more than a year's interest at seven per cent, together with \$65 taxes in arrears, was due. Thereupon Mr. Congleton, on November the 12th, again wrote to Mr. Hull, stating in substance that, if Mr. Hull would tell him the amount of interest due, he would try to arrange to pay the same and thus save the expenses of foreclosure. He received no answer to this letter. At the time these letters were written, the interest payment was not thirty days overdue and the mortgage was not subject to foreclosure under the terms thereof. Thereafter the action was brought, and Simonsen and wife and the Bush & Lane Piano Company were made parties defendant. As soon as the complaint was served upon the Bush & Lane Piano Company, that company, having previously paid the taxes, and being informed by the allegations of the complaint as to the amount claimed to be due as interest upon the note, tendered the interest, and kept the tender good by paying the interest into court. Upon these facts, the trial court entered the decree of foreclosure, from which the Bush & Lane Piano Company appeals.

The only question in the case is whether the note was due and the mortgage subject to be foreclosed.

The trial court was apparently of the opinion that, because the appellant was a purchaser of the mortgaged property at execution sale, it was not bound to pay the mortgage debt, and therefore there was no

obligation upon the respondent to demand payment from the Bush & Lane Piano Company, or to inform that company of the amount of interest due, prior to bringing the action to foreclose. It is apparent that the Bush & Lane Piano Company had succeeded to all the rights of the original mortgagors in the mortgaged property. *George v. Butler*, 26 Wash. 456, 67 Pac. 263, 90 Am. St. 756, 57 L. R. A. 396. The original mortgagors had no further interest therein except a right to redeem. The Bush & Lane Piano Company, having purchased the interest of the mortgagors, was required to pay the interest as it accrued and, eventually, the principal, or suffer a foreclosure against the mortgaged property. It seems too clear for argument that the Bush & Lane Piano Company was entitled to pay the interest until the maturity of the note. That company was entitled to know the amount of interest due upon the note so that it might pay the interest if it desired. It made diligent inquiry before there was any default in the interest payment, and manifested an intention to pay the interest and the taxes before there was any default. An opportunity to make these payments was refused, because the agent of the holder of the mortgage declined to make known to the Bush & Lane Piano Company the amount of interest due; and it was not until the complaint in foreclosure was served upon the piano company that it knew the amount of interest due. Thereupon the company tendered the interest.

This court has in a number of cases held that a provision in a note or mortgage hastening the date of maturity of the whole debt is for the benefit of the payee, and if he does not manifest any intention to claim it before a tender is actually made, there is no default such as will cause the maturity of the debt before the regular time provided in the agreement.

May 1920]

Opinion Per MOUNT, J.

Coman v. Peters, 52 Wash. 574, 100 Pac. 1002, and cases there cited; *Gunby v. Ingram*, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232. Under the rule of these cases, it was the duty of the respondent, before beginning foreclosure of her mortgage, to notify the appellant of the amount of interest due and of her intention to foreclose unless the interest was paid. The record here is plain to the effect that the respondent knew that the piano company had succeeded to the interest of the original mortgagors and desired to pay the interest so as to prevent a foreclosure; and that she or her agent refused to inform the appellant of the amount due. It is also apparent from the record that the appellant did not know, and had no means of knowing, the amount of interest due; that it made every effort to obtain the desired information, and that the respondent wrongfully concealed the information from the appellant. For these reasons, we are of the opinion that the trial court erred in entering the decree of foreclosure.

The judgment appealed from is reversed, and the cause remanded with directions to dismiss the action.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15747. Department One. May 13, 1920.]

G. F. RUST, *Appellant*, v. KITSAP COUNTY *et al.*,
Respondents.¹

CONSTITUTIONAL LAW (39)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATURE. The question whether an indebtedness is for a public purpose is ultimately a question for the courts, although a legislative declaration on the subject is entitled to great weight and should be upheld unless it appears beyond reasonable doubt to be mere pretense or dissimulation.

COUNTIES (62, 81)—LIMITATIONS ON INDEBTEDNESS—SUBMISSION TO VOTERS—COUNTY PURPOSE. The construction of a county road is for a strictly county purpose, within Const. Art. 8, § 6, authorizing the issue of bonds by counties without vote of the people within the limitation of one and one-half per centum of the taxable property of the county.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered October 17, 1919, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the issuance of bonds for county road purposes. Affirmed.

Bryan & Garland, for appellant.

H. E. Gorman, for respondents.

The Attorney General, R. M. Burgunder, Assistant, Fred C. Brown, and Howard A. Hanson, amicus curiae.

HOLCOMB, C. J.—Appellant sued to enjoin the commissioners of Kitsap county from issuing and selling \$100,000 in bonds for the purpose of constructing, repairing and improving roads and for other general county purposes. The question of issuing bonds was not submitted to a vote of the people and comes within the one and one-half constitutional debt limit. The lower court sustained a demurrer to the complaint and, upon the refusal of plaintiff to plead further and

¹Reported in 189 Pac. 994.

May 1920]

Opinion Per HOLCOMB C. J.

his election to stand upon his complaint, ordered the dismissal of the action.

The question is: Has a county the right to issue bonds for road purposes within the one and one-half per cent limitation without authorization from the people? In the pursuit of our inquiry we are first confronted with the case of *Shea v. Skagit County*, 68 Wash. 233, 122 Pac. 1061. In that case it was *not* decided, as contended in the briefs, that county commissioners were without power to issue bonds for the repair, construction or improvement of roads *without authorization from the people*. The issue of bonds was there submitted to a vote of the people. The notice of election failed to bring it within the terms of §§ 5094 to 5101-7, Rem. Code, being the county road and bridge bonds act, and it was contended that it came within the terms of §§ 5085 to 5093, Rem. Code, relating to bonds for county purposes. Since the latter act granted county commissioners authority to issue bonds, after submission to the people of the question of issuing bonds to procure money for *strictly county purposes*, and inasmuch as the legislature, when it passed the county road and bridge bonds act, evidenced its intention that the construction, improvement and repair of roads within the county should not be classed as a strictly county purpose, we held that the submission was not authorized under the act relating to bonds for county purposes, and that the county commissioners were, therefore, without any authority to issue the bonds.

The constitution, art. 8, § 6, after limiting the amount and manner of incurring indebtedness by any county, city, town, school district, or other municipal corporation, reads:

“Provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose

other than strictly county, city, town, school district, or other municipal purposes: . . .”

The question of the nature of the purpose of a county indebtedness was, in the *Shea* case, predicated upon the determination of the legislature. Subsequent to the filing of the opinion in the *Shea* case, the legislature, in 1913, virtually reenacted the county road and bridge bonds act (Laws of 1913, ch. 25, p. 62; Rem. Code, §§ 5101-1 to 5101-7). In § 1 of that act it is provided:

“The constructing or improving of any and all such roads, or the aiding therein, is hereby declared to be a county purpose.”

We are inclined to recede from the holding in the *Shea* case, and upon the question now being presented, it appears to us that whether a designated indebtedness is for a public purpose is in each case a proposition finally to be determined by the courts, and is not to be determined in the ultimate by the legislature. Otherwise the legislature could by its declaration contravene the plain constitutional provision. Since both the legislature and the courts are bound by the fundamental law, the constitution and the courts are the final interpreters thereof, and if it manifestly appeared on the face of an act that there was no possibility of a county purpose in the matter legislatively so declared, the legislative declaration would be mere pretense and dissimulation for no other purpose than to evade constitutional restrictions, and it would be the duty of the courts to so declare. *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11; *State ex rel. Case v. Howell*, 85 Wash. 281, 147 Pac. 1162. There is ample authority to sustain this. The rule is stated in Abbott on Public Securities, § 101, p. 214, as follows:

“Whether the purpose is a public one for the expenditure of moneys is a question exclusively for the

May 1920]

Opinion Per HOLCOMB C. J.

courts to determine. Legislative bodies cannot be the judges of their own infraction of fundamental law."

In Hainer, *The Modern Law of Municipal Securities*, § 128, p. 156, it is said:

"The question what is and what is not a public purpose, is one of law; and though, unquestionably, the legislature has large discretion in selecting the object for which taxes shall be laid, its decision is not final. In any case in which the legislature shall have clearly exceeded its authority in this regard, and levied a tax for a purpose not public, it is competent for any one, who, in person, or property, is affected by the tax to appeal to the courts for protection."

But the legislative declaration is entitled to great respect and weight and will be upheld unless it plainly appears, beyond any reasonable doubt, to be mere pretense or dissimulation. *State ex rel. Case v. Howell, supra.*

In deciding the *Shea* case, it is contended, this court held in effect that, when the legislature enacted the special road bond act of 1890, it carved an exception out of the general bond act of 1890 by *requiring* that all bonds for the construction and improvement of roads must be authorized by the people. The answer to that interpretation of the former decision is found in the words of § 5094, being the first section of the act itself:

"The board of county commissioners for any county may . . . submit to the *bona fide* voters of their county," etc.

It is a matter of discretion and not mandatory upon the commissioners to submit the question to the voters.

There can be no question that the purpose of the indebtedness in the present case (the construction, repairing and improvement of roads and other general county purposes) is a public one, but the question may

be raised: Is it a strictly county purpose? It is a county purpose, it is true, but the constructing, repairing and improvement of roads is likewise a state function, and there may be room for argument that such work cannot be considered as a strictly county function, and that the word "strictly" limits the purpose to the county or city or other municipal corporation and to that corporation alone. In so far as the work is done by the particular municipal corporation it is strictly its purpose. Other municipal authorities might aid in the improvement, but the work is a precise county purpose. In this we find support in *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, which is cited with approval on this same proposition in *State ex rel. Board of Commissioners v. Clausen*, 95 Wash. 214, at page 239, 163 Pac. 744. Counties are political subdivisions of the state and the state may delegate to, and empower counties with, such public functions as are inherently or properly local, and within such powers and duties prescribed, such functions should be deemed to deal with strictly county purposes, although exercised concurrently with the state.

Having decided, as a question properly to be passed upon by this court, that the purpose of the indebtedness is a public one and a strictly county purpose and not in violation of § 6, art. 8, state constitution, is there authority in §§ 5085 and 5087, Rem. Code, for the county commissioners to incur this indebtedness and issue bonds of the county without vote of the people? Those sections read as follows:

"Sec. 5085. Limitation of County Indebtedness.—Each and every organized county of this state, and each and every county that may hereafter be organized in this state, is hereby authorized and empowered by and through its board of county commissioners to

May 1920]

Opinion Per HOLCOMB C. J.

contract indebtedness for general county purposes in any manner when they deem it advisable, not exceeding an amount, together with the existing indebtedness of such county, of one and one-half per centum of the taxable property in such county, to be ascertained by the last assessment for the state and county purposes previous to the incurring of such indebtedness."

"Sec. 5087. Commissioners May Issue Bonds, When, and to What Amount.—Whenever any debt is incurred under the provisions of the first or second sections of this chapter [§§ 5085 and 5086], or whenever the board of commissioners of any county shall submit to the voters of this county, at an election to be held under the provisions of the last preceding section, the question of issuing bonds to procure money for strictly county purposes, and three-fifths of the voters of such county having assented thereto, and the amount of said bonds, together with the already existing county indebtedness, not exceeding five per centum of the taxable property of said county, to be ascertained as provided in the last preceding section of this chapter [§ 5086], then the board of commissioners of such county is authorized and empowered to issue its negotiable bonds in the name of the county for the purposes for which such election was held."

While the language employed in § 5085 would seem to render it plain that the county commissioners have the authority, § 5087 casts some doubt upon the question.

In *Hazeltine v. Blake*, 26 Wash. 231, 66 Pac. 394, the following language is employed by Justice Fullerton:

"No assent of the voters is required by a municipality to enable it to incur a debt within the first limitation. This it may do without such assent, and it may cause such indebtedness to be evidenced by warrants drawn upon its treasurer, or by bonds issued pursuant to the requirements of the statutes. The assent of the voters is required only in cases where it is sought to incur a debt within the second limitation."

That statement of the law is still correct and properly construes the statute quoted, and the county commissioners in this case have requisite authority under that statute.

In this view the lower court correctly sustained the demurrer, and the judgment is affirmed.

MACKINTOSH, MITCHELL, PARKER, and MAIN, JJ.,
CONCUR.

[No. 15588. Department Two. May 19, 1920.]

JOHN NORDSTROM, *Respondent and Cross-Appellant*, v.
ARON H. HOVER, *Appellant*.¹

EXCHANGE OF PROPERTY (2)—REMEDIES—FRAUD—RESCISSION. A contract for the exchange of properties may be rescinded for false representations that land was valuable farming land capable of being cropped and with a crop on it worth \$10,000, where the same was relied upon without examination of the land which was at a distance.

Cross-appeals from a judgment of the superior court for Spokane county, Blake, J., entered January 7, 1919, upon findings in favor of the plaintiff, in an action for rescission of a contract of exchange of lands, tried to the court. Affirmed.

Hamblen & Gilbert, for appellant.

Fred M. Williams and *Reuben Crandell*, for respondent.

MOUNT, J.—This action was brought by the plaintiff to rescind a contract of exchange of real estate and to recover from the defendant the value of land deeded by the plaintiff to the defendant. A number of persons were made parties defendant, but upon the trial of the case, all of these parties except Aron H. Hover

¹Reported in 189 Pac. 999.

May 1920]

Opinion Per MOUNT, J.

were dismissed because there was no evidence that they had any interest in the transaction.

The main facts necessary to be considered are substantially as follows: On June 6, 1918, the plaintiff and the defendant entered into a contract for the exchange of properties. The plaintiff owned 160 acres of timber land in Idaho. The defendant had an option to purchase 480 acres of land in the state of Montana. The defendant represented to the plaintiff that this Montana land was fine farming land; that all except forty acres of it was capable of being cultivated; that it was worth \$40 an acre; that there was a crop of wheat growing upon 120 acres of the land, and that this crop was worth \$10,000. Neither party saw the land of the other prior to the contract of exchange, and each relied upon the representations of the other. After the exchange had been made, the plaintiff went to Montana and examined the land that he had agreed to receive from the defendant, and found that it was not good farming land; that there was no crop thereon of any value; and that the land was not worth \$40 per acre, or anything like that amount. He thereupon demanded a rescission. The defendant had in the meantime sold, for \$4,000, the timber land in Idaho that he had received from the plaintiff. He refused to rescind the contract, and this action was brought. The case was tried to the court without a jury, and the court found that the defendant, Aron H. Hover, had falsely and fraudulently represented to the plaintiff that the land in Montana was fine farming land of the value of \$40 per acre; that the plaintiff relied upon these representations and was induced thereby to enter into the contract; that the plaintiff, in exchange for the Montana land, delivered to the defendant the Idaho land, which the trial court found to be of the value of \$4,000. The court then entered a decree rescinding

the contract, and gave judgment in favor of the plaintiff against the defendant for \$4,000. Each of the parties has appealed from this judgment.

The defendant argues that the facts are insufficient to warrant the court in finding any misrepresentation of the Montana land. The plaintiff argues that the trial court should have found the Idaho land to be worth more than \$4,000.

These are questions of fact entirely. We think the trial court was fully justified, under the evidence, in finding that the defendant misrepresented the character and value of the Montana land; and it is plain that the plaintiff relied wholly upon the representations made by the defendant in that regard. There is a letter in the record which, unexplained, tends to show that the plaintiff did not rely upon the representations of the defendant in regard to the character of the Montana land; but we are satisfied this letter was signed by the plaintiff without any knowledge of its contents. Upon the whole record, we are satisfied that the trial court properly found in favor of the plaintiff.

We are also satisfied that \$4,000 was a fair cash value of the timber land in Idaho deeded by the plaintiff to the defendant. It is true there is some evidence in the record to the effect that the timber upon the Idaho tract was worth \$5,400, and that the land without the timber was worth something like \$10 per acre; but these, we think, were speculative values, and the court properly found that the selling price by the defendant, namely, \$4,000, was the actual value of the land.

We find no error, and the judgment appealed from is in all respects affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

May 1920]

Syllabus.

[No. 15615. Department Two. May 19, 1920.]

L. C. KRIEGLER, *Plaintiff and Appellant*, v. SPOKANE
MERCHANTS' ASSOCIATION, *Defendant and*
Appellant.¹

EXECUTORS AND ADMINISTRATORS (141)—RIGHTS OF ADMINISTRATORS—BY BENEFICIARY. Where an administrator refuses to bring an action for an accounting upon stock held for an estate, an interested heir may bring the action.

ASSIGNMENT FOR CREDITORS (24)—ACTIONS BY ASSIGNEE. An assignor for the benefit of creditors who was the owner of stock assigned, may bring an action in her own name against the assignee for an accounting for waste and breach of trust.

APPEAL (452)—HARMLESS ERROR—ADMISSION OF EVIDENCE—TRIAL DE NOVO. On appeal from an action for an accounting, triable *de novo*, errors in the admission of evidence are immaterial.

EVIDENCE (211)—OPINIONS—COMPETENCY—VALUE OF LAND. A witness who had lived in a town over thirty years and laid out the townsite, and knew the property in question and its value, is competent to testify as to the value.

ACCOUNT (10)—ACTIONS FOR—DEMAND. A demand for the return of goods after all debts had been paid by the assignee is a sufficient demand to support an action against the assignee for an accounting.

* ASSIGNMENT FOR CREDITORS (37)—LIABILITY FOR LOSSES—NEGLECTED SALE OF PROPERTY. An assignee for the benefit of creditors who, without notice to anyone, accepted an offer and sold property for \$5,000, when it was inventoried for \$17,000 and could have been sold on any reasonable notice for \$10,000, is guilty of negligence rendering himself liable for the loss.

SAME (37)—ACCOUNTING—ATTORNEYS FEES. Under an assignment for the benefit of creditors in which the assignee agreed to sell the property and pay debts, retaining a commission of five per cent, he is not entitled to any allowance for attorney's fees.

FIXTURES (9)—BETWEEN VENDOR AND VENDEE—WALLED-IN SAFE. A safe, walled into a building with brick and which could not be taken out without tearing down the walls, is a fixture which passes to the purchaser of the building.

APPEAL (72)—DECISIONS REVIEWABLE—PART OF JUDGMENT. A plaintiff may appeal from the part of a judgment adverse to her,

¹Reported in 189 Pac. 1004.

under Rem. Code, § 1719, notwithstanding the case is triable *de novo* on appeal.

ASSIGNMENT FOR CREDITORS (37)—ACCOUNTING—CHARGES—CLAIMS
CONSENTED TO. An assignor for the benefit of creditors who consented that a claim against her husband's estate be paid out of the funds cannot, in an action for accounting, charge the payment against the assignee, even if the probate court was without jurisdiction to make the order for the payment.

Cross-appeals from a judgment of the superior court for Lincoln county, Sessions, J., entered April 23, 1919, in favor of the plaintiff, in an action for an accounting, tried to the court. Modified on defendant's appeal.

*J. D. Campbell, J. B. Campbell, Wakefield & Wither-
spoon, and Dodds & Dodds, for appellant.*

*J. D. McCallum and M. E. Jesseph, for respondent
and cross-appellant.*

MOUNT, J.—This action was brought for an accounting against the defendant. Trial to the court without a jury resulted in a judgment in favor of the plaintiff for the return of certain property and for a money judgment on account of real estate sold by the defendant. Both parties have appealed from the judgment. We shall therefore designate them as "plaintiff" and "defendant."

It appears that, prior to the year 1915, the majority of the stock of the Kriegler-Page Mercantile Company was owned by the plaintiff and her husband, E. J. Kriegler. A few shares were owned by another party. The management of the company was under the control of E. J. Kriegler, during his lifetime. After E. J. Kriegler's death, his wife, claiming to own all the stock of the company, undertook to manage the business. It did not prosper, and on the 5th day of May, 1915, she made an assignment of all the property of

May 1920]

Opinion Per MOUNT, J.

the company to the defendant, Spokane Merchants' Association, a corporation. This assignment was made for the benefit of creditors, and the assignee went into possession of all the property under an agreement to dispose of the merchandise on hand to pay the creditors and thereupon return the balance of the property to the plaintiff. The property included in the assignment consisted of a stock of general merchandise and also of certain real estate in the town of Ruff, in Adams county, and in the town of Odessa, in Lincoln county. After the assignment, the assignee made sales of the personal property and conducted the business for a period of several months. The plaintiff then made a demand upon the defendant that the balance of the property be returned to her in accordance with the agreement at the time of the assignment. She alleged in her complaint, in substance, that the property of the Kriegler-Page Mercantile Company was wasted and dissipated; that great loss resulted to her by reason thereof; that various articles of merchandise were sold at less than their real value; that the real estate in the town of Odessa was sold without her consent and at a price less than half the sum it could have been sold for if the assignee had used reasonable care, or any degree of care, in procuring a purchaser; and that the assignee was guilty of a breach of trust in disposing of the real estate.

The trial of the case was lengthy. It involved an accounting between the parties, and many items were considered. The court, after listening to all the evidence, was of the opinion that the assignee, in the discharge of its duties in handling the merchandise and personal property assigned to it, had used due diligence; that the plaintiff, during most of the time when the sales were taking place, was present in the store or about the premises, and knew of the manner in

which the sales were made and the prices obtained therefor, and made no objections thereto. The court therefore concluded that the defendant had performed its full duty in regard to the items of personal property handled by it. In regard to the real estate in the town of Odessa, which consisted of a brick store building, the trial court was of the opinion that the assignee did not use due diligence in making the sale of this property; that it was sold for less than half its value and without the knowledge of the plaintiff; that, if the defendant had used due diligence or due care, the property would have been sold for at least \$10,000, when it was actually sold for \$5,000. The court, for that reason, entered a judgment in favor of the plaintiff for the difference between what the real estate ought to have been sold for and what it was actually sold for.

The defendant argues, first, that the plaintiff had no right to bring this action. This contention is based upon the claim that the plaintiff is not the owner of the stock of the Kriegler-Page Mercantile Company. It is argued that a part of this stock descended to her by reason of the ownership of her husband; that her husband's estate was in process of administration in the probate court; and that it was the duty of the administrator of that estate to bring the action. There are two sufficient answers to this assignment of error: First, the complaint alleges that the administrator of the estate of E. J. Kriegler, deceased, refuses to bring the action; and second, it was shown upon the trial, without any contradiction, that all of the stock of this Kriegler-Page Mercantile Company, before the death of E. J. Kriegler, was assigned to the plaintiff, and that the plaintiff was the owner thereof; that the shares that were held by other persons had been purchased by her before this action was begun. So it

May 1920]

Opinion Per MOUNT, J.

appears from the record that the plaintiff is the sole owner of all the stock of the corporation, and therefore may maintain the action.

The defendant next assigns several errors on account of persons being permitted to testify as to the value of the real estate, maintaining that these persons were not qualified to testify. We shall not discuss these assignments in detail. The case is triable here *de novo* and we shall consider only evidence which was admissible. There were several witnesses who testified as to the value of the property. One of these witnesses was G. W. Finney, who testified that he had lived in Odessa for thirty-two years; had laid out the town site; knew the property in question; had bought and sold property in the town and knew the value of this particular real estate. Clearly, this witness was competent to testify as to the value of the property. He did so testify, and placed its value at from \$12,000 to \$13,000. There were other witnesses equally competent to testify, and all the witnesses for the plaintiff placed the value of the real estate in the town of Odessa at not less than \$10,000. There was competent evidence, therefore, to show that this was the value of the property.

The defendant then argues that the court erred in denying the defendant's motion for a nonsuit at the close of the plaintiff's evidence, because there had been no demand for an accounting. The evidence seems to be quite clear that the plaintiff had, on different occasions, demanded that the property be returned to her, claiming that the debts had all been paid prior to the time she brought the action.

Defendant next strenuously argues that the court erred in finding that the defendant had been negligent and careless in selling the real estate in Odessa for \$5,000.

"It is well settled that an assignee for the benefit of creditors is bound to exercise the same care in the management of the estate intrusted to him that an ordinarily prudent person would use in his own affairs under like circumstances, and he may be held personally liable for such losses, deficiencies or injuries as may be occasioned by his affirmative or negative violation of this rule and the duties it imposes." 2 R. C. L., page 712, § 65, under title, "Assignments for the Benefit of Creditors."

This rule does not seem to be disputed. We think the record is reasonably plain that the real estate in the town of Odessa was worth at least \$10,000, and that it could have been sold, upon any kind of notice, for at least this sum. The defendant, without letting it be known that the property was for sale, accepted an offer of \$5,000 for it, and closed the sale. Within a week, and before the sale was concluded, the purchaser sold the poorest half of the property for \$5,000 and refused \$6,000 for the other half. Besides this, the property was inventoried for \$17,000 at the time it was taken over by the assignee. Insurance for a much larger sum than it was sold for was carried on the buildings alone, and the evidence shows, with little or no dispute, that the real estate sold for \$5,000 was worth more than \$10,000 and could have been sold without any effort for at least \$10,000. We think the trial court therefore properly concluded that the defendant did not use that degree of care in the management of the real estate that an ordinarily prudent person would have used in his own affairs under like circumstances.

Defendant further argues that the plaintiff is estopped to make a claim for damages on account of the sale of this real property, because she knew of the sale and consented to it. Her evidence is clear to the effect that she did not know of the sale until long

May 1920]

Opinion Per MOUNT, J.

after it had been made; that, as soon as she knew of it, she protested against the sale. There was clearly no estoppel here.

Defendant next claims that the court erred in not allowing it an attorney's fee for defending this case. There is no provision of the law authorizing an attorney's fee in a case of this kind. The assignee took the property of the plaintiff under an agreement to sell the same and to pay the debts, and retain as its compensation a commission of five per cent on all sales. This action was brought for an accounting upon that trust. There is no statute warranting the allowance of an attorney's fee in such a case. The court properly denied the same.

It appears that in the building which was sold by the assignee there was a safe of the value of \$600. The court allowed a recovery for the value of this safe. It appears that, at the time the building was erected, this safe was built into the structure. It was walled in with brick, and there is evidence to the effect that it could not be taken out of the building without tearing down the walls. It is plain from the record in the case that this safe was a part of the building; as much so as any other article which was built into the walls of the building. It could not be taken out without tearing down the walls. It was a part of the building and a permanent fixture there, under the rule in *Ballard v. Alaska Theatre Co.*, 93 Wash. 655, 161 Pac. 478. We think the court erred in allowing a recovery for this item.

The defendant moves to dismiss the plaintiff's appeal for the reason that the case is triable here *de novo*, and that the appeal attempted to be taken by the plaintiff purports to be an appeal from a part only of said decree. It is true the appeal of the plaintiff is from a part only of the decree, but it is from the

whole of the decree adverse to the plaintiff. The statute, Rem. Code, § 1719, provides that a party may appeal from a part of any judgment. Clearly this plaintiff had a right to appeal from the part of the decree which was against her. There is no merit in the motion, and it is therefore denied.

The plaintiff, in her cross-appeal, assigns a number of errors with reference to certain items which she claims were sold under price or in violation of the agreement. We think it is needless to discuss these in detail. We are satisfied that, in the conduct of the business, so far as it related to the merchandise, the assignee endeavored faithfully to obtain the best price and to close up the business with dispatch and to promptly pay the creditors. There is one item, however, that we think may be noticed briefly. It is claimed by the plaintiff that the court erred in allowing the claim of one Joe Kriegler for something like \$3,800 to be paid by the assignee. It appears that Joe Kriegler was a brother of E. J. Kriegler; that, upon the death of E. J. Kriegler, he owed his brother Joe some \$3,250; that his brother, because of this debt, succeeded to the administration of E. J. Kriegler's estate. After the assignment by Mrs. Kriegler, it was proposed that this debt to Joe Kriegler should be paid by the assignee out of the funds of the Kriegler-Page Mercantile Company. The plaintiff, according to the testimony, agreed that this might be done, and that the probate matter might be settled in this way. An order of the probate court was obtained to that effect, and in accordance with that order Joe Kriegler was paid by the defendant. Even if the probate court was without jurisdiction to make the order, the record shows that the plaintiff agreed that the payment should be made in that way and it was so made. We think there was no error, therefore, in the refusal of the

May 1920]

Opinion Per MACKINTOSH, J.

court to charge this item up against Joe Kriegler or the Spokane Merchants' Association.

We think there is no merit in any of the other assignments of the plaintiff.

That part of the judgment appealed from by the defendant is modified to the extent that \$600 be deducted therefrom. In all other respects the judgment is affirmed. The defendant will recover its costs in this court.

HOLCOMB, C. J., FULLERTON, and BRIDGES, JJ., concur.

[No. 15513. *En Banc*. May 24, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
Hattie C. Gunn, Plaintiff, v. THE SUPERIOR
 COURT FOR KING COUNTY, *Respondent*.¹

PROCESS (4-1)—PERSONS AGAINST WHOM PROCESS MAY BE SERVED—NON-RESIDENTS. A non-resident who is temporarily in the state for the purpose of defending a pending action is privileged from the service of process in a civil transitory action. (HOLCOMB, C. J., MITCHELL, TOLMAN, and PARKER, JJ., dissent.)

Application filed in the supreme court September 2, 1919, for a writ of prohibition to prevent the superior court for King county, Dykeman, J., from proceeding further with a cause. Granted.

Herbert E. Snook, for relator.

Gay & Griffin, for respondent.

MACKINTOSH, J.—On February 1, 1918, a complaint was filed in the superior court of King county, seeking damages against the relator here for personal injuries alleged to have been suffered by the plaintiff.

¹Reported in 189 Pac. 1016.

At that time, and at all times thereafter, the relator was not a resident of the state of Washington, but was and is a resident of the state of Nevada. On March 27, 1919, the action was brought on for trial, and the relator was present, having come to the city of Seattle from Nevada for the purpose of being present at the trial and defending the action. When the case was called for trial, the plaintiff dismissed her suit, and before the relator could leave the courthouse in which the court was sitting, a complaint was filed against her in an action seeking damages upon the same state of facts alleged in the original case just dismissed, and service was made upon the relator. Thereafter the relator entered her special appearance in this second action and asked the court to quash the attempted service of the complaint for the reason that she was privileged from such service and from being sued within the state of Washington, for the reason that she was within the state at the time of the alleged service as a party in an action of law then pending in the superior court of King county, and that she was present in the state solely to defend herself against such action. After argument, the motion to quash was denied, and the relator then commenced this action in this court, seeking a writ of prohibition directed to the superior court of King county, restraining it from proceeding further in the cause.

The sole question for determination is: Can a non-resident litigant, who comes to this state solely to defend a suit in which he is named as defendant, be served with process in a new suit while temporarily within this state? The action from the prosecution of which the relator seeks to escape is a civil action and a transitory one. The question is for the first time presented to this court, although it has been before the Federal courts and the courts of a majority of

May 1920]

Opinion Per MACKINTOSH, J.

the states upon many occasions, and has resulted in the adoption of majority and minority rules. We have no statute bearing upon the question. We are not concerned here with the privilege existing in criminal actions, nor the privilege of witnesses, nor the privilege of parties to civil actions who are residents of this state. The majority rule is that a nonresident of a state is privileged from the service of process in a new suit while he is temporarily in the state defending a suit then pending. This rule is founded upon the common law rule which granted the privilege to witnesses and parties in attendance upon the courts. This rule was, as the authorities state, primarily adopted for the purpose of preventing inconvenience to the courts and to facilitate the orderly and unhampered trial of causes. Witnesses, by the service of subpoenas, were compelled to attend court, and parties, although not under the same compulsion, were under a like compulsion, arising from the necessity of their being present in order to freely protect their interests which were at stake in the litigation. It was felt, and the rule was established to carry that feeling into effect, that witnesses and parties should be free to attend and to leave the court without having the work of the court embarrassed and interfered with by the service of civil process during their attendance. That freedom from service of process will be found to be referred to in the early cases as freedom from arrest, for the reason that, at the common law, the mode of process in civil actions had grown up as an arrest of the person. But the fact that it was a physical arrest is not determinative of the extent of the privilege, for the reason that arrest was the only means by which civil process could be served, and the rule was not established because the service happened to take that form, but for the underlying reason we

have indicated—that it facilitated the work of the courts.

Stress is laid by the courts adhering to the minority rule upon the fact that the common law rule referred to freedom from arrest. But when we bear in mind that that was the only form of civil process, and the further fact that the arrest in civil cases, at common law, soon developed into nothing more than a formality, the person upon whom civil process was served not being actually taken into custody, and being allowed, as a matter of right, to furnish bail, which consisted of his personal recognizance, so that no physical detention accompanied the arrest, which remained an arrest only in name and not in fact, we will see that the minority courts are basing their reasoning upon words, forgetting the substance. Those who criticize the majority rule lose sight of the underlying principle which gave rise to it and argue that the rule having originated when arrest of the person gave the court jurisdiction in civil cases, that now, such process being obsolete, the rule should be annulled. They mistake the early application of the rule for the reason of the rule.

It is not necessary to further discuss the origin and development of the common law upon this subject, but content ourselves with the statement of the fundamental idea on which the common law rule rested. At common law, witnesses and parties were privileged from the service of the then existing means of summons in civil actions during the time they were in attendance upon the court.

A review of the decided cases would extend this opinion to an unpardonable length and would reveal that the eminent judges of the various Federal courts and the supreme court itself, and the overwhelming majority of the state courts, are committed to the rule

May 1920]

Opinion Per MACKINTOSH, J.

established at common law, and that only a small minority of the state courts adhere to the contrary doctrine. We are content to follow the majority rule, not only because of its overwhelming endorsement by the courts and the eminent jurists who have given it their sanction, but as well because it is founded upon a reason which originally was sound, and which time has not altered. As Judge Cooley says, in *Mitchell v. Huron County Circuit Judge*, 53 Mich. 541, 19 N. W. 176:

“Public policy, the due administration of justice, and protection of parties and witnesses alike demand it. There would be no question about it if the suit had been commenced by arrest; but the reasons for exemption are applicable, though with somewhat less force, in other cases also.”

In *Wilson Sewing Machine Co. v. Wilson*, 22 Fed. 803, it is said:

“It is important to the administration of justice that each party to a suit should have a free and untrammelled opportunity to present his case and that non-resident defendants should not be deterred by the fear of being harassed or burdened with new suits in a foreign state, from presenting themselves in such state to testify in their own behalf, or to defend their property.”

To those who may be interested in an examination of the decisions, the following may be cited as cases in conformity with the ruling here made, holding that the privilege extends equally to exemption from the service of summons as to exemption from arrest: *Stewart v. Ramsey*, 242 U. S. 128; *Hale v. Wharton*, 73 Fed. 739; *Parker v. Hotchkiss*, 1 Wall. Jr. 269 (Fed. Cas. 10,739); *Wilson Sewing Machine Co. v. Wilson*, *supra*; *Brooks v. Farwell*, 4 Fed. 166; *Juneau Bank v. McSpedan*, 5 Biss. 64 (Fed. Cas. 7,582); *Small v. Montgomery*, 23 Fed. 707; *Kinnie v. Lant*, 68 Fed. 436;

Mechanical Appliance Co. v. Castleman, 215 U. S. 437; *Cain v. Commercial Pub. Co.*, 232 U. S. 124; *Atchison v. Morris*, 11 Fed. 582; *Nichols v. Horton*, 14 Fed. 327; *Morrow v. Dudley*, 144 Fed. 441; *Bridges v. Sheldon*, 7 Fed. 17; *Lyell v. Goodwin*, 4 McLean (U. S. Cir. Ct.) 29; *Peet v. Fowler*, 170 Fed. 618; *Kaufman v. Garner*, 173 Fed. 550; *Skinner & Mounce Co. v. Waite*, 155 Fed. 828; *Roschynialski v. Hale*, 201 Fed. 1017; *Lardned v. Griffin*, 12 Fed. 590; *In re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Halsey v. State*, 4 N. J. L. 369; *Brown v. Getchell*, 11 Mass. 11; *Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. 547; *Roberts v. Thompson*, 134 N. Y. Supp. 363, 149 App. Div. 437; *Brooks v. State ex rel. Richards*, 3 Boyce (Del.) 1, 79 Atl. 790; *Smith v. Alabama*, 124 U. S. 465; *Richardson v. Smith*, 74 N. J. L. 111, 65 Atl. 162; *Matthews v. Tufts*, 87 N. Y. 568; *Mitchell v. Huron County Circuit Judge*, *supra*; *Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 10 Am. St. 48, 3 L. R. A. 266; *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Linton v. Cooper*, 54 Neb. 438, 74 N. W. 842, 69 Am. St. 727; *Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108; *Murray v. Wilcox*, 122 Iowa 188, 97 N. W. 1087, 101 Am. St. 263, 64 L. R. A. 534; *Martin v. Bacon*, 76 Ark. 158, 88 S. W. 863, 113 Am. St. 81; *Long v. Hawken*, 114 Md. 234, 79 Atl. 190, 42 L. R. A. (N. S.) 1101; *Dungan v. Miller*, 37 N. J. L. 182; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Miles v. McCullough*, 1 Binn. (Pa.) 77; *Palmer v. Rowan*, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844; *Hayes v. Shields*, 2 Yeates (Pa.) 221; *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. 731; *Cameron v. Roberts*, 87 Wis. 291, 58 N. W. 376, 41 Am. St. 43; *Starret's Case*, 1 Dallas (Pa.) 355; *Persse v. Persse*, 5 H. L. Cas. 671; *Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989, 32 Am. St. 770, 20 L. R. A. 45; *United*

May 1920] Dissenting Opinion Per MITCHELL, J.

States v. Edme, 9 Serg. & R. (Pa.) 147; *Norris v. Beach*, 2 Johns. (N. Y.) *294; *Sanford v. Chase*, 3 Cow. (N. Y.) 381; *Henegar v. Spangler*, 29 Ga. 217; *Bal-linger v. Elliott*, 72 N. C. 594; *Arding v. Flower*, 8 Term. Rep. (K. B.) 534; *Newton v. Askew*, 6 Hare (Ch.) 319; *Tribune Ass'n v. Sleaman*, 12 N. Y. Civ. Proc. 20; *Fisk v. Westover*, 4 S. D. 233, 55 N. W. 961, 46 Am. St. 780; *Minnich v. Packard*, 42 Ind. App. 371, 85 N. E. 787; *Tory v. Bast*, 3 W. V. C. 63.

The minority rule is supported by the following authorities: *Baldwin v. Emerson*, 16 R. I. 304, 15 Atl. 83, 27 Am. St. 741; *Ellis v. Degarmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560; *Bishop v. Vose*, 27 Conn. 1; *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. 726; *Gwynn v. McDaniel*, 4 Ida. 605, 43 Pac. 74, 95 Am. St. 158; *Greer v. Young*, 120 Ill. 184, 11 N. E. 167; *Lewis v. Miller*, 115 Ky. 623, 74 S. W. 691.

The rule we follow in this case in no wise conflicts with the general rule that a nonresident temporarily within a state but not in attendance upon court may be served with civil process and be subjected to the jurisdiction of the courts of that state.

The writ will issue.

FULLERTON, MAIN, MOUNT, and BRIDGES, JJ., concur.

MITCHELL, J. (dissenting).—I dissent. If the rule relied on in the majority opinion were the law in this state — of which I am satisfied to the contrary — it would afford no justification for the conclusion directing the writ to issue. The reasons given by the courts in establishing what is spoken of as the majority rule have no application whatever to the present case. Those reasons are that it is important to the administration of justice that each party to a suit should have an unhampered opportunity to present his case, and

that a nonresident witness or party should not be deterred by the fear of being harassed or burdened with new suits in a foreign state. The cases supporting that rule are uniformly the same and are clearly illustrated by the cases of *Mitchell v. Huron County Circuit Judge*, 53 Mich. 541, 19 N. W. 176, and *Wilson Sewing Machine Co. v. Wilson*, 22 Fed. 803, cited and quoted from in the majority opinion. In the Michigan case, the relator had gone to another jurisdiction to testify in two cases. Judge Cooley said:

“He was examined as a witness in one of the causes and the other was continued. He makes oath that he was a necessary witness in the two cases, and attended the court for the sole purpose of giving his evidence. While so in attendance he was served with a summons in another case.”

In the case of *Wilson Sewing Machine Co. v. Wilson*, *supra*, the defendant, a resident of Chicago, had gone to Connecticut to serve as a witness and to instruct his counsel in a case wherein he was defendant and one Alford was plaintiff. During the time of the trial of that case, he was served in the courthouse with a summons and complaint in an action brought by the Wilson Sewing Machine Company. The district judge sustained a plea in abatement, upon the ground that the service was illegal, for the reason given in the quotation from that case in the majority opinion herein. But the case at bar presents a different situation. The petition here alleges that, when the case was called for trial in the superior court of King county, the plaintiff took a voluntary nonsuit, and before the relator had left the courthouse building caused a summons to be served upon her, and two days later filed with the clerk of the superior court a complaint upon the same cause of action as the one just dismissed. That is, she was within and subject to the jurisdiction

May 1920]

Dissenting Opinion Per MITCHELL, J.

of the court for the trial of the cause in which she appeared as defendant. Her privilege and the administration of justice were the same—neither more nor less—as if she had been a resident suitor. As to that cause of action, the plaintiff therein was entitled to take a voluntary nonsuit against her and commence the action anew, just as though she had been a resident of the state, without crossing the majority rule relied on. Within the reason of that rule, the effect of what was done amounted to nothing more than a continuance of the trial of the cause in which this relator, as a suitor, had already appeared. That rule proscribes the starting of a new suit for a different cause of action, while here the parties, the cause of action and the court are the same as in the case voluntarily nonsuited by the plaintiff. The reason for the rule fails in this case hence the rule itself has no application, and the demurrer to the petition filed in this court should be sustained.

But, passing the demurrer and considering what is suggested by the relator and declared by the majority opinion to be the sole question in the case, I am convinced, as already stated, the majority opinion is wrong. On this branch of the case I am willing to assume, for argument's sake, that the action which the relator seeks to abate is not only a new suit, strictly speaking, but is a suit upon a cause of action different from the first one. It is more important to find out and declare what the law in this state is than to ascertain what it is in other states, or what other courts have declared the law to be in other jurisdictions. Rather than say we have no statute bearing upon the question of whether a nonresident litigant, who comes to this state solely to defend a suit in which he is named as a defendant, can be served with process in a new suit, it would be more accurate to say we have no statute

granting any privilege or immunity to such person; for the concluding paragraph of the majority opinion states that all other nonresidents temporarily within the state may be served with civil process and subjected to the jurisdiction of the courts.

Section 207, Rem. Code, found in the chapter on the subject of the commencement and trial of civil actions, provides:

“In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be *served with process*, . . .”

If it be claimed this section relates only to the place of trial and shall not be construed as authority by which to determine who may or may not be served with process, then certainly the statute making the common law the rule of decision in this state, by undeniable directions, authorizes the service of civil process upon nonresidents temporarily within this state so as to subject them to the jurisdiction of the courts, whether they be suitors or not.

At common law the commencement of the suit was the original or royal writ, sued out from the court of chancery and directed to the sheriff, requiring him to command the party complained of to satisfy the complainant, else to appear and answer in the court of common pleas. The writ was followed by process which, more anciently, consisted first of verbal warning to the defendant to appear in court on the return day of the original writ. If defendant failed to appear, an attachment of his goods followed, if he had any. At a later period, in nearly all cases a *capias* was issued out of the court of common pleas and served upon the defendant at the same time as verbal summons upon the original writ. At a still later period of time, the summons was omitted, and the writ of *capias*

May 1920] Dissenting Opinion Per MITCHELL, J.

became the first process. In book 3, Blackstone's Commentaries (Lewis' ed.), at page 287, it is said:

"For, not having obeyed the original summons, he had shown a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases by the gradual indulgence of the courts, (at length authorized by statute 12 Geo. I. c. 29, which was amended by statute 5 Geo. II. c. 27, made perpetual by statute 21 Geo. II. c. 3, and extended to all inferior courts by 19 Geo. III. c. 70) the sheriff or proper officer can now only personally serve the defendant with the copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action; which in effect reduces it to a mere summons."

During all the time the writ of *capias* was in use to the extent of restraint of the person, certain persons, including suitors and witnesses, enjoyed the privilege of exemption from arrest. Blackstone's Commentaries, book 3, page 289. Freedom from restraint was accomplished by special bail, or application by the defendant to the court for discharge and the filing of common bail; if special bail had already been furnished, the bail bond was ordered canceled. In all such cases, however, process was served, the court obtained jurisdiction of the person and the suit went on.

The Federal courts have adopted the majority rule. The latest of such cases is *Stewart v. Ramsay*, 242 U. S. 128. It was a case in which Ramsey was sued by Stewart while the former was in a state other than that of his residence as a witness in the case wherein he was plaintiff and one Anderson defendant. His plea in abatement as being exempt from process was sustained. In the opinion it is said, at page 130:

“In *Blight v. Fisher* (1809), Pet. C. C. 41, Fed. Cas. No. 1542, Mr. Justice Washington, sitting at circuit, held that the privilege of a suitor or witness extended only to an exemption from arrest, and that the service of a summons was not a violation of the privilege or a contempt of court unless done in the actual or constructive presence of the court. But in *Parker v. Hotchkiss* (1849), 1 Wall. Jr. 269, Fed. Cas. No. 10,739, District Judge Kane, with the concurrence, as he states, of Chief Justice Taney and Mr. Justice Grier, overruled *Blight v. Fisher*, and sustained the privilege in favor of a non-resident admitted to make defense in a pending suit and served with summons while attending court for that purpose,”

Then, proceeding, the court quotes from and adopts the reason given in *Parker v. Hotchkiss*, 1 Wall. Jr. 269 (Fed. Cas. No. 10,739), showing that the claim of personal immunity to the suitor was granted because of the privilege of the court, rather than of the defendant; being founded, as asserted, upon the necessities of judicial administration. There is no claim that the decision rests upon either statute or common law. On the other hand, the case of *Blight v. Fisher*, Pet. C. C. 41 (Fed. Cas. No. 1,542), was one in which the law as such was ascertained and declared. In it Mr. Justice Washington said:

“Mr. Stockton has taken the true distinction. The service of process, whether a *capias* or summons, in the actual or constructive presence of the court, is a contempt, for which the officer may be punished. But the privilege of a suitor or witness extends only to an exemption from arrest. The privilege claimed being in derogation of the right of the other party to sue, the defendant’s counsel were fairly called upon to produce some case to support his claim to the privilege.”

Then follows a review of cases relied on by the defendant, showing they are without merit, and the opinion concludes with the statement:

May 1920] Dissenting Opinion Per MITCHELL, J.

“On the other hand, the writers, who speak upon this subject, confine the privilege of suitor and witnesses to exemption from arrest, and not a dictum to the contrary is to be found.”

A greater number of the state courts have adopted the majority rule. I have not taken occasion to examine either the constitutions or statutes of such states to ascertain if they authorized imprisonment for debt at the dates of the decisions, or provided for the issuance of a *capias* as or in connection with the summons in the commencement of actions. Certainly, in this state, the writ of *capias* and imprisonment for debt have been abolished.

In addition to *Stewart v. Ramsay*, *supra*, counsel for relator cites only 32 Cyc., page 492, § 6, and the case of *Long v. Hawken*, 114 Md. 234, 79 Atl. 190, 42 L. R. A. (N. S.) 1101, in support of his contention. The first contains a list of cases both for and against the majority rule. To the same effect see 21 R. C. L., page 1305 *et seq.* The Maryland case (the commencement of another action while the defendant was actually engaged in court as a party in the trial of a case) supports the majority rule, admits considerable conflict of authority in the cases upon the general question, and cites a number of favorable state and Federal cases. About the same time (1911), in a rather elaborate opinion in *Brooks v. State ex rel. Richards*, 3 Boyce (Del.) 1, 79 Atl. 790 (a case in which process was served in an independent suit), the Delaware court, though declining to apply the general rule in that case for reasons not necessary to mention here, reaffirmed the general rule and, among other things, said:

“The rule is based upon reason and was established for a purpose which has been consistently adhered to from the early English authorities down through the

modern American authorities upon the subject. The reason of the rule is the proper administration of justice and its purpose is to protect that administration from embarrassments and interruptions caused by disturbance to those whose attendance upon the courts is compelled by duty or necessity."

Proceeding, there is given a list of English and American authorities. Considering the English authorities, which we think important, we examine two among those first cited:

(a) Bacon's Abridgment, "Privilege," vol. 8, page 168, B 2. Examined, it reads:

"The law not only allows privileges to the officers of the court, but also protects all those whose attendance is necessary in courts; so that if a suitor is arrested either in the face of the court, or out of the court, as he is coming to attend and follow his suit, or upon his return, it appears upon complaint made thereof, that the fact was so, the court will not only discharge the party from the arrest, but will punish the officers or bailiffs, as also the plaintiff (*a*) who procured the arrest, as for a contempt to the court."

(b) Tidd's Practice, vol. 1, page 195. Examined, it reads:

"The Parties to a suit, and their *Attorneys* and *Witnesses*, are for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from the courts; or, as it is usually termed, *eundo, morando, et redeundo*."

On the other hand, we call specific attention to only two of the authorities supporting the minority rule. In the case of *Baldwin v. Emerson*, 16 R. I. 304, 15 Atl. 83, 27 Am. St. 741, the court said:

"The question whether a party in attendance upon a court, in the prosecution or defense of a suit, is privileged from the service of a summons for the commencement of a suit against him, is one upon which there has been a contrariety of decision. The general

May 1920]

Dissenting Opinion Per MITCHELL, J.

rule relating to protection from the service of process is, that all persons who have any relation to a cause which calls for their attendance in court are protected from arrest while going to and attending court and returning. This protection, however, is not wholly, nor chiefly, the privilege of the person, but is granted in the interest of the public, that the courts may not be embarrassed or impeded in the conduct of their business. Hence, it has generally been held, that the protection is limited to exemption from arrest and does not extend to the service of process which does not interfere with or prevent the attendance of the person upon the court." [Citing cases.]

Then follows a review of American authorities, holding *pro* or *con*, and the court concludes as follows:

"While we concede the force of the reasons advanced for protecting non-resident witnesses from the service of a summons against them for the commencement of a suit, *eundo, morando, et redeundo*, we are not convinced of the sufficiency of the reasons assigned for the exemption of non-resident suitors from such process. We think it would rarely happen that the attention of a non-resident plaintiff or defendant would be so distracted by the mere service of a summons from the immediate business in hand, in prosecuting or defending a pending suit, that the interests of justice would suffer in consequence, or that the liability to such service would often deter them from prosecuting or defending their just claims or rights. The reasons assigned for the exemption would apply equally as well to resident as to non-resident suitors, and it has never been deemed necessary to exempt resident suitors from the service of a summons, so far as we have been able to find, except in the single state of Pennsylvania. We think these reasons are fanciful rather than substantial. We are of the opinion, therefore, that a non-resident suitor attending court in the prosecution of a suit is not exempt from the service of a summons against him in another suit."

In the case of *Greer v. Young*, 120 Ill. 184, 11 N. E. 167, the supreme court of Illinois said:

“The ruling of the court, therefore, must be rested entirely upon the privilege or immunity which the common law has, from a very early period, extended to parties and witnesses in a lawsuit while attending court, including going and coming. This rule is found in all the text books, and, in most of the cases we have examined, is expressly limited to cases of *arrest* on civil process. 1 Tidd (1st Amer. Ed.) 174; 1 Bl. Comm. 289, side p. 1; Greenl. Ev. §§ 316, 317; 2 Bouv. Dict. 284.

“The rule as laid down in the above works, is fully sustained by an almost unbroken current of authority, as is fully shown by the following cases: *Meckius v. Smith*, 1 H. Bl. 636; *Kinder v. Williams*, 4 Term R. 378; *Arding v. Flower*, 8 Term R. 534; *Spence v. Bert*, 3 East 89; *More v. Booth*, 3 Ves. 350; *Ex parte Hawkins*, 4 Ves. 691; *Ex parte King*, 7 Ves. 313; *Sidgier v. Birch*, 9 Ves. 69; *Ex parte Jackson*, 15 Ves. 117-120.

“The above authorities are also valuable as throwing light upon the procedure or practice in cases of this kind. The arrest of a party to a suit, by civil process, being regarded as a breach of the defendant’s privilege, the usual course was to appear in the cause in which the arrest was made, and procure a rule against the plaintiff and his attorney to show cause why the defendant should not be discharged out of custody by reason of his alleged privilege, *upon his filing common bail*. The rule to show cause was always supported by affidavit setting up the fact of the arrest, and attendant circumstances. On the hearing, the rule, depending upon the proofs, was either made absolute or discharged. If the former, the defendant, upon filing common or nominal bail, was discharged, and, if he had given special bail, the bail bond was ordered to be surrendered and canceled. Nevertheless, the defendant was in court, and was bound to answer the action.”

These two cases have been selected because they, like others of a similar sort, either directly or through authorities cited, discover the common law and the English statutes prior to the year 1776, upon the sub-

May 1920] Dissenting Opinion Per MITCHELL, J.

ject, and at the same time give convincing reason for declaring and applying the same in the absence of any controlling constitutional or statutory mandate to the contrary.

The privilege accorded the suitor was simply immunity from personal restraint caused by the service and enforcement of the *capias*. It had to do only with the manner or style of the process, and even in case the defendant was exempt from arrest, as said in *Greer v. Young, supra*, he was in court, and was bound to answer the action. The summons used in the commencement of an action in this state in no manner threatens the personal liberty of the defendant. While it requires him to appear within twenty days, it only means he must proceed to make up issues for the trial of the controversy, or judgment by default will be taken against him, and does not mean that he will ever be compelled necessarily to personally appear in court. He may testify by deposition, a plan formerly unknown to the common law courts. And if it be said judicial administration is better served by having a party personally present in court to testify, it may also be said that, for the same reason, it would be better to have any other witness personally present, from which it would follow that we have just as much right and power to attempt to set aside the statute which provides no person shall be compelled to attend as a witness before any court in a civil action out of the county in which he resides, unless his residence be within twenty miles of such court, as we have to attempt to set aside another statute which, reaching through the common law, provides that a nonresident temporarily in this state, whether suitor or witness, or not, may be served with process and subjected to the jurisdiction of the courts. In the case of *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934, it was said:

“The common law, as adopted by our legislature in 1863, in so far as the same was not incompatible with our conditions, including the statute law of England as it existed at the date of the Declaration of Independence, became the common law of the late territory of Washington, and, by virtue of the constitution, the law of this state, and still continues to be the law except in so far as it has been modified by legislative enactment. *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. 56, 15 L. R. A. 784.”

Thus, whatever may be the rule in other jurisdictions, having seen that, by the common law, the privilege of a suitor, while engaged as such, from the service of process extends only to immunity from arrest, still leaving him to answer the action; having seen that the writ of *habeas corpus* is not in use here; having seen that a summons in no manner threatens the personal restraint of a defendant; having seen that the common law and statutes of England, prior to the time of the Declaration of Independence, constitute the rule of decision in this state; and finding we have no written law allowing the privilege claimed by the relator; then for the solution of the inquiry we must revert to and declare the rule of the common law, to the effect that where a person is actually present within this state, although a nonresident and only temporarily present, he may, upon proper service of process, be subjected to the jurisdiction of the courts of this state.

HOLCOMB, C. J., TOLMAN, and PARKER, JJ., concur with MITCHELL, J.

June 1920]

Statement of Case.

[No. 15872. Department One. June 2, 1920.]

THE STATE OF WASHINGTON, *on the Relation of John J.
Stephens et al., Plaintiff*, v. THE SUPERIOR COURT
FOR SNOHOMISH COUNTY, *Guy C. Alston,*
*Judge, Respondent.*¹

CERTIORARI (30)—SCOPE AND EXTENT OF REVIEW—OBJECTIONS. Upon certiorari to review an adjudication of public necessity, error in omitting to prove the filing of a partnership certificate cannot be urged on appeal where the objection was not raised below.

EMINENT DOMAIN (104)—PROCEEDINGS—CONDITIONS PRECEDENT. Rem. Code, § 5857-3, providing that, as a condition precedent for condemnation for a private way of necessity, a logging road shall contract and agree to carry timber products at reasonable prices, is satisfied by the filing of the contract at the time of the adjudication of public necessity.

SAME (39, 40)—NECESSITY—SELECTION OF ROUTE—FEASIBILITY OF OTHER ROUTE. Condemnation for a private way of necessity for a logging road is not shown to be unnecessary by the fact that the logs could be taken out and hauled over a paved public highway by trucks, where the pavement would be ruined by such use.

SAME (39, 40). In the absence of bad faith or abuse of power in the selection of a route for a private way of necessity for a logging road, the condemnation cannot be defeated by evidence that another route is feasible.

SAME (39, 40). Whether there is a reasonable necessity for a private way for a logging road must be determined from the entire situation; and findings of necessity are not supported where it appears that there was a floatable stream which the relator could use, notwithstanding it was not as convenient as desired due to the fact that floating logs without booms might result in jams and injury to the property.

Certiorari to review an order of the superior court for Snohomish county, Alston, J., entered April 16, 1920, adjudging a public use and necessity in condemnation proceedings, after a trial to the court. Reversed.

¹Reported in 190 Pac. 234.

Louis A. Merrick, for relators.

M. J. McGuinness, W. P. Bell, and Kerr & McCord,
for respondent.

MACKINTOSH, J.—This is certiorari to review the proceedings leading up to and resulting in the entry of an order of necessity in a condemnation action brought by George Miller and Joseph Swalwell, doing business as the Miller Logging Company, seeking a right of way for a logging railroad across the lands of the petitioners in this action.

The objections raised to the regularity of the proceedings and the entry of the order of necessity we will examine in the order in which they were urged.

First: Irregularities in the manner of the service of the condemnation notice and petition. An examination of the return of the person making the service, and of the record made by the petitioners on their special appearance when they were objecting to the service, satisfies us that there is no merit in this point and that due and proper service of notice and petition was had upon the property owners.

Second: It is urged that the proceedings are defective and that the court was without jurisdiction for the reason that the logging company failed to prove the filing of its certificate of partnership character. It may be that it is unnecessary in the preliminary proceedings which are here under review to make this proof; but, assuming, however, without deciding, that it was error to omit proving the filing of the partnership certificate, the rule is that errors of this sort which are not called to the attention of the trial court will not be considered here, for the reason that it is to be presumed that an oversight of this kind can be easily remedied when it occurs by calling the court's attention to it at the trial. This is the rule which has been

June 1920]

Opinion Per MACKINTOSH, J.

applied many times in cases of appeal. *Rothchild Brothers v. Mahoney*, 51 Wash. 633, 99 Pac. 1031; *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192; *Pier-son v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509; *Thompson-Spencer Co. v. Thompson*, 61 Wash. 547, 112 Pac. 655; *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837; *Washington Printing Co. v. Osner*, 99 Wash. 537, 169 Pac. 988. We see no good reason why the rule should not be applied here, though this is not strictly an appeal, the proceedings in a condemnation suit, anterior to the trial of the question of damages, being reviewable here not by appeal, but by certiorari.

Third: The petitioners claim that the condemnation petition failed to give the court jurisdiction by reason of its failure to allege an offer of contract to haul produce raised by the landowners upon the lands through which the right of way was being sought. Laws of 1913, ch. 133, § 3, p. 412, (Rem. Code, § 5857-1) provides that one seeking a right of way for a logging railroad, as a condition precedent, must "contract and agree to carry and convey over such roads to the termini thereof any of the timber or other produce of the lands through which such right of way is acquired." There was no contract or agreement alleged in the petition, nor was any offer thereof made, although the transcript now contains a contract and agreement signed by the logging company which was filed on the day that the order of necessity was filed. It is not necessary, under § 3, that the contract and agreement there called for should be tendered or proven in the preliminaries of a condemnation proceeding. It may be properly withheld until the trial takes place on the question of damages, or may be presented at any time prior to the close of the trial of the case. It is only necessary that such agreement or contract appear in the final record in the

case, and must be entered into by the condemning parties before they can acquire the right of way. There was, therefore, no error in the failure to allege an offer to enter into such contract; and, if there was error, it was cured by the voluntary act of the logging company in offering such contract as noted.

Fourth: The most serious objection made to the record is that the evidence fails to sustain the court's finding of necessity. This condemnation takes place under chapter 133, Laws of 1913, page 412, which provides for the taking of private property for private ways of necessity, § 1 of the act providing:

"An owner . . . of land which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity. . . . The term 'private way of necessity,' as used in this act, shall mean and include a right of way on, across, over or through the land of another for . . . the construction and maintenance thereon of . . . logging roads." (Rem. Code, § 5857-1).

The landowners claim that the testimony shows that a feasible route exists for the logging company to take its timber out other than over their lands, and that such a route is adequate and in every way preferable to the route sought by the condemnation; that two other routes could be used over lands either owned or leased by the logging company connecting with public highways, and that, therefore, no necessity existed for a private way over their lands for the benefit of the logging company.

It was claimed in the testimony that the logging company might, by the use of trucks, take out their logs across their own land to the public paved highway.

June 1920]

Opinion Per MACKINTOSH, J.

Testimony was introduced by the landowners showing that such an operation was possible; whereas, the logging company's testimony, as found by the trial court, shows that the use of the paved highway "is not a way this timber can be taken out or should be taken out; it is not a way the logging company should be required to take it out. . . . The paved highway was built for a public use and not to be used as a private way for logging companies. The road would not last to take out seventy million feet of lumber, it would be nothing but a lot of junk; broken up concrete, so that is not a way these logs should be taken out. In fact, it is a way they should not be permitted to be taken out." With this conclusion we must agree.

It was further alleged that a more feasible route exists for the logging company by taking the logs by a road to be condemned over private property belonging to others than the parties to this proceeding, but, even were this a proper matter for consideration, the testimony is not at all convincing that such route is more feasible. The selection of the route by the logging company makes a *prima facie* case of the necessity for taking such specific land, and in the absence of evidence of bad faith, oppression, or abuse of power, evidence that another route is feasible is not enough to show that the selection of the route sought by the condemners shows such bad faith, oppression, or abuse of power. As we said in *State ex rel. Grays Harbor Logging Co. v. Superior Court*, 82 Wash. 503, 144 Pac. 722:

"In order to justify the court in ordering the change of location of the proposed road, it was necessary to show, not only another route which was practicable and that the road could be constructed thereon at reasonable cost, but it was necessary to go further and show by clear and convincing evidence that in the se-

lection of the route sought to be condemned there was bad faith, oppression, or an abuse of power. The evidence offered does not go to the extent of showing that the route selected by the condemner causes unnecessary damage to the relators' property, and that the route over Sec. 31 would cause much less damage to that property than would the route selected cause to the relators' property."

There was, therefore, no merit in the suggestion that the logging company should be forced to condemn the other route suggested by the respondents here.

The main contention against the necessity of the condemnation was based upon the proximity of a floatable river, upon which logs could be taken from a point above the landowners' property. Testimony pro and con on this question was introduced, and if it is satisfactorily established thereby that this route was adapted to the business of the logging company, it would not be entitled to maintain these condemnation proceedings, for the only reason for condemning private property is because there is a reasonable necessity for another method of getting out the logs than that which is already open to the logging company. If there is a reasonable necessity for the use of the land sought to be condemned, that necessity is not overcome, however, by the existence of another possible route. The necessity which is required by the statute is a reasonable necessity, and to determine whether it is reasonably necessary the court is compelled to view the entire situation. *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175; *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444; *State ex rel. Postal Tel.-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855; *State ex rel. Grays Harbor Logging Co. v. Superior Court*, *supra*; *State ex rel. Preston Mill Co. v. Superior Court*, 91 Wash. 249, 157 Pac. 689; *State ex*

June 1920]

Opinion Per MACKINTOSH, J.

rel. Patterson v. Superior Court, 102 Wash. 331, 173 Pac. 186.

The trial court found that it was not feasible to float loose logs down the river, but found that, if they could be rafted above the land of the petitioners here and taken out that way, it was a feasible way, but "if they have to be taken down loose to some point where they can be rafted and towed away, I do not think it is feasible," and found that "there is no evidence here that it is feasible to boom these logs above the respondent's land and tow them out in booms during the entire year; and that is the only feasible way, in my opinion, to get these logs out; is in booms and not letting them float down the river, forming jams and damaging people's property," concluding therefrom that there was a necessity for building the logging road as petitioned for by the logging company.

As we read the evidence, we cannot concur with this finding. The evidence tended only to show that the water route, if logs were floated, was not as convenient as might be desired, and that it could be made more satisfactory were it possible to boom the logs. The inconvenience arose from the fact that floating the logs might result in jams and injury to property abutting on the river, but these are considerations which are not material to the question before us, for those are incidents to logging operations on floatable streams, and as long as they are not the result of negligent or unauthorized acts of the logging company they are not the basis of actionable liability. The river, being a floatable one, the logging company had the right to use it for the floating of logs, and though this may not afford the ideal means of egress, it destroys the claim that there is a reasonable necessity to interfere with the relators' property. The right of the private landowner to full and free possession and use of his prop-

erty is not to be curtailed unless there is a reasonable necessity therefor, and the fact that convenience of the party seeking the condemnation will be served cannot take from another his property to serve that convenience. As between alternative routes over private property, the question of which is more feasible may be material; but when the discussion is between a route over private property and a route already possessed by the condemner, the question is one of reasonable necessity.

The landowners rely upon the case of *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 181 Pac. 689, where it was held that no necessity existed where the road sought for a private way of necessity was more convenient and more practicable than a road already for seven years in use, the question in that case being, "whether one, having a legal right to pass over the lands of his grantor, may reject the way the law gives him and which his grantor cannot deny him, and compel a way of necessity over the lands of a stranger, where, upon a mere admeasurement of convenience and expense, it is held that the way over the land of the stranger is the more practicable than the way over the land of the grantor." A review of the testimony in that case satisfied the court that no necessity existed, the court recognizing that "in this state we have perhaps adopted the rule of reasonable necessity."

The question of necessity is a question of fact and, under the rule which has been adhered to, the proof in this case was not sufficient to show a reasonable necessity; therefore the order entered by the trial court was incorrect. For the reasons stated, the action of the lower court is reversed.

HOLCOMB, C. J., PARKER, MITCHELL, and MAIN, JJ., concur.

June 1920]

Opinion Per TOLMAN, J.

[No. 15846. Department Two. June 4, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. ROBERT
CHITTENDEN, *Alias Fred Robinson, Appellant*.¹

FORGERY (7-1)—EVIDENCE—SUFFICIENCY. A conviction of forgery is sustained by evidence that defendant cashed a check purporting to be drawn by a fuel company, that no such company could be found, and that the payee's endorsement was probably written by the same person who drew and signed the check.

CRIMINAL LAW (452)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Where the jury were instructed to base their verdict exclusively on the evidence, and the prosecutor's remarks were not over-zealous, it is not prejudicial error to refuse to instruct that the jury should not consider the opinion of the prosecutor.

SAME (301)—TRIAL—INSTRUCTIONS—FORM AND LANGUAGE. It is not error to refuse a request to address the instructions to each juror individually rather than to the jury as a body.

SAME (316)—TRIAL—INSTRUCTIONS ALREADY GIVEN. It is not error to refuse instructions that are given in substance in the general charge.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 31, 1919, upon a trial and conviction of forgery. Affirmed.

Guy E. Kelly and *Thomas McMahon*, for appellant.
William D. Askren and *J. W. Selden*, for respondent.

TOLMAN, J.—Appellant was arrested in California, brought back to Pierce county, and there arraigned and tried upon an information charging that he, with intent to defraud the prosecuting witness of \$27.50 in money, cashed a check for that amount drawn on the Scandinavian American Bank of Tacoma, to the order of Fred Robinson, signed by the Acme Fuel Company, by James E. Davidson, President, knowing that the

¹Reported in 190 Pac. 232.

drawer of said check was not authorized or entitled to make or draw the same. From a verdict of guilty and a judgment of conviction thereon, this appeal is taken.

The prosecuting witness identified appellant as the person who came into his store on January 16, 1919, and asked him to cash the check, and testified that he had never seen the appellant before that time, and only for about three minutes on that occasion; that he suggested to appellant that he did not know the Acme Fuel Company, and appellant, in answer, suggested that he satisfy himself by telephone; that he went to the rear of the store as if for that purpose, and then noticing that it was after banking hours, that his clerks were all busy, that other customers were waiting to be served, and being impressed by the appearance of appellant, he abandoned the idea of telephoning and cashed the check without further question; that the check was dishonored at the bank on which it was drawn; that he caused inquiry to be made at the bank and learned that there was no such concern as the Acme Fuel Company known to it; that he knew of no such company, and knew of no such person as James E. Davidson president of any fuel company. Two police officers testified that they had searched the Tacoma city directories and the telephone directories covering a period of six years immediately prior thereto, and had inquired of at least three different people engaged in the fuel business in the city of Tacoma, and that they knew of and could learn nothing of any such company as the Acme Fuel Company, or of any such person as James E. Davidson engaged in the fuel business in Tacoma, though, on cross-examination, they refused to state positively that there was no such person operating under that name. The check, with the notations made upon it, was introduced in evi-

June 1920]

Opinion Per *TOLMAN, J.*

dence, and an officer of the bank on which the check was drawn explained the notations as showing that the bank had no such depositor and no account subject to a check so signed, stating further that he knew of no such fuel company or man in the fuel business, and his bank had no such customer. After qualifying as a handwriting expert, he further testified that he had compared the handwriting on the face of the check, including the signature, with the indorsement of "Fred Robinson" on the back of the check, and gave it as his best judgment that the same hand that wrote the indorsement also wrote and signed the check. Certain qualifying remarks by this witness are the basis of some of appellant's assignments of error, and we therefore quote the witness on this subject:

"Q. I wish you would take this check, State's Exhibit A, and look at the signature on the front, James E. Davidson, president, and also the payee in the check, Fred Robinson, and compare them with the words 'Fred Robinson' on the back, and state whether or not in your judgment it was the same hand that wrote all of that on this check? A. I think it is, although I would not care to state that definitely. Q. That is your best judgment? A. My best judgment is that it is, but I made a mistake once, however. Q. Do you see a considerable similarity between the writing? A. Yes, the capital 'R' bears a strong characteristic of being the same. The figures are similar; the strokes in the figure '2' and the figure '5' on the front and back of the check show the same. The letters 'on' in 'Robinson' appears to be the same. One is written in a backhand as if it were written by the same person in an attempt to disguise it evidently, but I would feel fairly sure the same person wrote both of them."

On cross-examination, the witness stated that there was some similarity between the handwriting of appellant's then counsel, which was shown him, and the handwriting on the check, but he would be more definite

as to the similarity of the handwriting on the face and the back of the check.

Appellant contends that the trial court should have dismissed the case, instructed a verdict for defendant, or at least have granted a new trial, because of the insufficiency of the evidence. It is admitted that there was sufficient evidence from which the jury could find that the appellant was the person who cashed the check, and that the check was bad because the drawer had no account in the bank upon which it was drawn; but it is strenuously argued that the evidence was insufficient to justify the jury in finding that the Acme Fuel Company was non-existent, or that the person who indorsed and cashed the check in fact wrote it, and that the jury must have found one of these facts in order to draw the inference that appellant in cashing the check intended to defraud. The check was dated Tacoma, Washington, January 16, 1919, on a printed form, stamped with its amount by a protectograph, such as is used by well established business houses, and the name Acme Fuel Company was stamped thereon by a rubber stamp, from which the jury would be fairly justified in drawing the conclusion that it was not such a check as would be drawn by an itinerant dealer, or by a producer or dealer doing business in some other city, some suburb, or outlying timber or mining district. When there is added to the check itself the testimony as to the inquiry made for the Acme Fuel Company and James E. Davidson in the fuel business, and the results of that inquiry as testified to, the conclusion, in the absence of explanation, became almost irresistible that the check was fraudulently uttered and negotiated. But were this not so, the testimony of the officer of the bank, hereinbefore quoted, taken in connection with the check itself and

June 1920]

Opinion Per TOLMAN, J.

the obvious similarity of the handwriting on its face to the indorsement, shown by direct testimony to have been made by appellant, would be sufficient evidence to justify the jury in finding the necessary criminal intent. If we admit, for present purposes, as contended by appellant, that, in a criminal case, a mere scintilla of evidence, or even some proof, is not sufficient to require the submission of the case to the jury, yet that rule does not apply here, because, as we view it, there was substantial evidence upon all material points. As we said in *State v. Lance*, 94 Wash. 484, 162 Pac. 574:

“We are satisfied that there is substantial evidence tending to show every material fact necessary to be shown in order to sustain the verdict found. This is as far as the appellate court may legitimately inquire. The weight of the evidence was for the jury, and, when it is found that every material fact necessary to be proven has support in the evidence and that the trial court has refused to interfere, the verdict is conclusive.”

Appellant makes no complaint of instructions given, but assigns error upon the refusal of the court to give three instructions requested by him. The first of these covers the subject that the opinion of the prosecuting attorney as to defendant's guilt should not be considered by the jury. The court did instruct that the jurors should base their conclusions exclusively upon the evidence in the case, and we see nothing so far overzealous in the prosecutor's remarks to the jury, which are preserved in the record, as to make it error to refuse the requested instruction.

The next requested instruction was to the effect that all of the court's instructions were intended as though addressed to each juror individually instead of to the jury as a body. It seems well settled in this state

that it is not error to refuse such an instruction. *State v. Robinson*, 12 Wash. 491, 41 Pac. 884; *State v. Cushing*, 17 Wash. 544, 50 Pac. 512.

The last requested instruction, upon the refusal of which error is assigned, was given in substance by the court, and, as given, appears to have been as clear and as favorable to appellant as was the one he requested.

The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15871. Department Two. June 4, 1920.]

C. A. RAWLINGS *et al.*, Respondents, v.

JOHN W. HEAL, JR., Appellant.¹

HUSBAND AND WIFE (20, 58, 60)—WIFE'S SEPARATE ESTATE—PROCEEDS—COMMUNITY PROPERTY—PRESUMPTIONS—EVIDENCE. Since the status of community property is fixed at the time of its purchase, and a purchase money mortgage by both husband and wife was for the community, the fact that the balance of the purchase price was paid by the separate funds of the wife and on that account the deed was at her request taken in her name, is not sufficient to overcome the presumption that it became community property, except to the extent of her original investment, notwithstanding that the husband stated that it was her property and thereafter the mortgage was in part paid off with funds given to the wife by her father.

ADVERSE POSSESSION (37)—PLEADING—POSSESSION. An allegation in a complaint to quiet title that the plaintiffs and their grantors have been in adverse possession for more than the statutory period, is insufficient to show that the possession of one of the grantors was adverse to that of another grantor through whom defendant claimed.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered December 1,

¹Reported in 190 Pac. 237.

June 1920]

Opinion Per TOLMAN, J.

1919, upon findings in favor of the plaintiffs, in an action to quiet title, tried to the court. Reversed.

S. H. Kelloran and John W. Heal, Jr., for appellant.
Bigelow & Manier, for respondents.

TOLMAN, J.—The facts necessary for a decision of this case are practically all admitted, and may be briefly stated as follows: In 1899, Andrew Wright and Juliet C. Wright, husband and wife, acquired by purchase 320 acres of land in Thurston county, Washington, the purchase price of which was \$2,240. This was paid by the turning in of a ten-acre tract of land belonging to the wife as her separate property, upon which the parties theretofore had made their home, at a valuation of \$700, and by the giving of a mortgage on the land purchased, signed by both the husband and wife, to secure the payment of the balance of \$1,540, the mortgage debt being evidenced by notes also signed by both the husband and wife. At the time of the purchase, the husband and wife being both present, the wife, according to her testimony, said: "I told him (her husband) that I had given up my home for this, and I thought he should put it in my name, and he did not object." The deed was therefore made to Juliet C. Wright as grantee. Thereafter the mortgage was paid with funds derived from the sale of a portion of the land, from the sale of logs from the land, and the remainder by money given to the wife for that purpose by her father.

In the year 1908, Andrew Wright died, leaving surviving him his wife and four children. His estate was not probated, but on January 23, 1909, Juliet C. Wright made and filed of record an affidavit in which she set forth that her husband died intestate, leaving no unpaid indebtedness, and naming the four children and

herself as his only heirs. On January 5, 1914, appellant recovered judgment in the superior court for Thurston county against Lona Wright Spillman, one of the children of Andrew and Juliet C. Wright, which judgment has never been satisfied. In January, 1919, Juliet C. Wright and the four children, including Lona Wright Spillman, joined in a deed conveying seventy acres of the tract of land acquired as heretofore stated to the respondents. The purchase money therefor was all paid to Juliet C. Wright except \$800, which was evidenced and secured by a mortgage payable to her, which contained a provision that, if respondents were required to pay anything on account of appellant's judgment against Mrs. Spillman in order to protect their title, such payment should be credited upon the mortgage debt. Shortly after thus acquiring title, the respondents began this action against appellant to quiet their title as against his judgment.

There was also evidence offered that Andrew Wright in his lifetime joined with his wife in deeding portions of the land which were conveyed; that he executed a right of way agreement for a logging road across the land, and that he stated to the wife and to the children that the land belonged to the wife. The family made its home upon the land from the time of the purchase until the death of Mr. Wright, and the farm was operated mainly by the sons, who looked after the business affairs and testified to the payment of the purchase money mortgage and the taxes on behalf of their mother. From a decree made and entered on December 1, 1919, quieting title in respondents free from any claim or lien on the part of appellant, and awarding them judgment for costs, this appeal was taken.

The lien of appellant's judgment, which continued for six years after its rendition (*Seattle Brewing &*

June 1920]

Opinion Per TOLMAN, J.

Malting Company v. Donofrio, 59 Wash. 98, 109 Pac. 335; *Catton v. Reehling*, 78 Wash. 187, 138 Pac. 669), has now expired, and our first thought was that the question now before us is a moot one only; but as this point has not been raised or argued, and as the appellant, after the entry of the decree, which did not restrain him from so doing, might have proceeded by the issuance and levy of an execution to acquire a specific lien and by sheriff's sale to acquire title to some part of the land, we have thought best to pass this question and inquire only whether or not appellant's judgment was a general lien on December 1, 1919, when the decree was entered.

“Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof; the presumption always being that it is community property, but this presumption may be rebutted by proof.” *United States Fidelity & Guaranty Co. v. Lee*, 58 Wash. 16, 107 Pac. 870.

It is now equally well settled in this state that the status of the property is fixed at the time of the purchase, and that, if the husband and wife unite in a promissory note secured by a mortgage, payable direct to their grantor as a part of the purchase price, or, by the same means, borrow the money to be used in payment from a third party, in either such event the money borrowed becomes community property, and to that extent the purchased property is community property. *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673, and cases there cited. An apparent exception to the latter part of this rule, as is pointed out in *Finn v. Finn*, 106 Wash. 137, 179 Pac. 103, arises when the spouse who furnishes the separate consideration for the purchase raises or secures the remainder of the

purchase price by a mortgage upon separate property theretofore owned by such spouse, thus clearly making the debt a separate one, even though the other spouse may be required to join in the note and mortgage to satisfy the lender. See, also, *Graves v. Columbia Underwriters*, 93 Wash. 196, 160 Pac. 436.

Applying the law to the facts in this case, it is apparent that the request of the wife that she be named as grantee in the deed was based upon the fact that she was furnishing \$700 of the purchase price from her separate estate, and the husband's consent, or want of objection thereto, was an admission of no more than that, to that extent, the property received should likewise be her separate estate. There is no evidence that, at the time of the purchase, the wife had any other separate estate or means with which to pay the mortgage debt, or that she then had any expectation of a subsequent gift from her father for that purpose, and the natural presumption is that the husband and wife then contemplated that they would, by their joint efforts and the use of the property purchased, pay the mortgage debt as it matured. Clearly, neither these facts, nor the fact that the wife was the business man of the community and thereafter paid the mortgage debt in whole or in part with her separate funds, nor the evidence that the husband in his lifetime referred to the property as belonging to his wife, are sufficient to overcome the presumption in favor of the community character of the property acquired during the existence of the marriage, no matter to which spouse the deed ran.

It is contended that Juliet C. Wright has been in the open, notorious and adverse possession of the property under consideration and has paid the taxes for a sufficient time to claim the protection of the statute of limitations.

June 1920]

Opinion Per TOLMAN, J.

Unfortunately the only allegation of the complaint under which the statute of limitations can be considered is:

"That the plaintiffs and their grantors have been in the open, notorious and adverse possession of said property for a period of forty years and have paid all taxes thereon for a like period of time."

Since Lona Wright Spillman was one of respondent's grantors, that allegation fails to show any possession by any one adverse to her, nor do we find any evidence in the record that Mrs. Wright's possession has been openly and notoriously adverse to her children or either of them.

We conclude, therefore, that, at the time of the acquisition, the title to an undivided 700/2240 of the property vested in Juliet C. Wright as her separate estate, title to the remainder then vesting in the community, and at the time of the sale to respondents, Lona Wright Spillman was the owner of an undivided one-eighth interest in the community estate, upon which appellant's judgment was a general lien at the time the decree was entered.

The judgment appealed from is therefore reversed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15864. Department Two. June 4, 1920.]

BIG FOUR LAND COMPANY, *Appellant*, v.

MIKE DARACUNAS *et al.*,

Respondents.¹

FRAUDS, STATUTE OF (20, 35)—BROKER'S COMMISSION—DESCRIPTION OF LANDS—SUFFICIENCY. A contract for a broker's commission on a sale of "40 acres at Forest," is not sufficiently certain under the statute requiring the same to be in writing, and the contract was not completed so as to take the same out of the operation of the statute where it was cancelled and the property sold for a less price.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered February 25, 1920, upon sustaining a demurrer to the complaint, dismissing an action on contract. Affirmed.

W. W. Langhorne, for appellant.

O. J. Albers, for respondents.

MOUNT, J.—This appeal is from an order of the court below sustaining a demurrer to the plaintiff's complaint and dismissing the action on the refusal of the plaintiff to plead further. The action was brought to recover a broker's commission, under a written contract of employment entered into between the parties as follows:

"Big Four Land Co.

"In consideration of one dollar and valuable services by you performed, I hereby vest in you the exclusive authority to buy or sell for the term of 90 days from the date hereof and thereafter till the expiration of 10 days written notice of withdrawal of the property hereinafter described, to wit: 40 acres at Forest located in.....for the sum of \$6,000, as follows.....
Cash; balance.....

¹Reported in 190 Pac. 229.

June 1920]

Opinion Per MOUNT, J.

"I agree that in case a sale is made through you or your influence during the term of this contract or three months thereafter, to allow you a commission of 5 per cent on the selling price, and to convey or cause the same to be conveyed by a good and sufficient deed to the person or persons designated by you, and to furnish a complete abstract of title to said property certified to date by a competent abstracter, and to pay all taxes due on said property up to date of sale.

"Dated at Chehalis, Wash., this 26th day of July, 1919. Mike Daracunas, Owner."

Then followed a description of certain personal property to be included in the sale.

The complaint alleged that the plaintiff found a purchaser; that thereafter the defendant cancelled the contract, but within the time limited in the contract, defendant sold the property for \$5,400; that plaintiff demanded its commission, amounting to \$270.

It is apparent from a reading of the contract that the description therein contained of the property to be sold, "40 acres at Forest," is not sufficient to take the contract out of the statute of frauds. This court has held in a number of cases where the description was more definite than the one here, that such description was insufficient. See *Rogers v. Lippy*, 99 Wash. 312, 169 Pac. 858. The appellant apparently concedes that the contract in this case is insufficient, but argues that here was a completed contract, and for that reason the appellant is entitled to the commission. He bases this contention upon what was said in the case of *Henneberg v. Cook*, 103 Wash. 685, 175 Pac. 313. In that case a recovery was permitted, but that was a case where the property had been sold and a part of the commissions paid and a promise of payment of the balance. In that case we distinguished our previous cases, and said:

“The rule established in the *Rogers* and *Nance* cases, *supra*, should not be extended to cases where the services of a broker have been completed, all the parties to the sale contract have fully performed, a written promise to pay the broker for his service has been signed by the party to be charged, and there existed no necessity for specific performance to complete the sale.”

If, in this case, the complaint had alleged that the respondent, after the sale, had paid a part of the commission and had agreed to pay the balance, then that case would control. But there is no such allegation in the complaint and the fact is, as shown by the complaint, that the contract here sued upon was not completed. The land was sold at a less price than named in the contract, and the appellants are now seeking to recover upon a contract for commissions which, under our many decisions, is insufficient under the statute of frauds.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., FULLERTON, BRIDGES, and TOLMAN, JJ., concur.

June 1920]

Opinion Per MOUNT, J.

[No. 15887. Department Two. June 4, 1920.]

C. W. BOOST *et al.*, *Appellants*, v. FRANK CAPEN *et al.*,
Respondents, ELIZABETH McDOWELL, *Defendant*.¹

MORTGAGES (23)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY. A deed of a half interest in a farm is not shown by clear, satisfactory and cogent proof to have been intended as a mortgage, where the evidence of one party that the deed was to secure advances to finance the farm was directly contradicted, no evidence of indebtedness was taken, and no rate of interest agreed upon, and there was direct evidence of a sale of the half interest for an agreed price, which was to be put into the farm and was in fact advanced to clear up the grantor's debts and run the place.

Appeal from a judgment of the superior court of Thurston county, Wright, J., entered October 15, 1919, in favor of the defendants, in an action for partition, tried to the court. Reversed.

Wood, Montague & Matthiessen, and *Troy & Sturdevant*, for appellants.

Frank C. Owings, for respondents.

MOUNT, J.—This action was brought by the plaintiffs, who alleged they were owners of an undivided one-half interest in certain described eight hundred acres of land in Thurston county. The prayer was for partition of the premises between the plaintiffs and the defendants. For answer to the complaint, the defendants denied that the plaintiffs were the owners in fee of an undivided one-half interest in the land and, by affirmative defense, alleged that the deed which had been executed by the defendants to the plaintiffs was intended to be, and was in fact, a mortgage. For reply, the plaintiffs denied the affirmative allegations of the answer. Upon these issues, the case was tried to the

¹Reported in 190 Pac. 240.

court without a jury, and resulted in a judgment to the effect that the deed given by the defendants to the plaintiffs was in fact a mortgage, and that there was \$7,467.10 due from the defendants to the plaintiffs. The plaintiffs have appealed from that judgment.

At the trial of the case, the appellant, Mr. Boost, offered in evidence a deed which was executed on November 24, 1915, by the defendants to the plaintiffs. He then testified that the property was incapable of division without a sale. The defense then endeavored to show that the deed, which was a general warranty deed in form, was in fact a mortgage. This was the sole disputed question in the case, and is the only one presented here for our determination.

The rule in this class of cases is, as stated by this court many times:

“Before a deed absolute in form will be adjudged a mortgage, clear, satisfactory, and cogent proof must be produced to establish the fact that it was given as security for an indebtedness, and that both parties so intended.” *Washington Safe Deposit & Trust Co. v. Lietzow*, 59 Wash. 281, 109 Pac. 1021.

In the case of *Nutter v. Cowley Investment Co.*, 85 Wash. 207, 147 Pac. 896, we said:

“We have carefully examined the evidence and conclude that the trial judge erred in holding the deed to be a mortgage. We are satisfied that it was an absolute conveyance, and was so intended by the parties. All written instruments before us indicate this fact most clearly. No note was executed to respondents by appellants. We have repeatedly announced the rule that when property has been conveyed by a deed absolute in form, without any contract of defeasance, or other written instrument showing that it was intended as a mortgage, clear, convincing and cogent evidence will be required to establish the contention that it was intended as a mortgage.”

June 1920]

Opinion Per MOUNT, J.

The only evidence in this record even tending to show that the deed executed by the respondents to the appellant in November of 1915, was intended to be a mortgage was the evidence of Mr. Capen, one of the grantors. His testimony in effect was that the appellant, Mr. Boost, was his wife's uncle; that Mr. Boost agreed to advance money with which to run the place, and that the deed was intended as a mortgage to secure these advances. It was not claimed that any note or other evidence of indebtedness was ever given, or that any rate of interest was ever agreed upon or discussed.

The testimony on behalf of the appellant, Mr. Boost, was to the effect that he was informed by the respondents, Mr. and Mrs. Capen, that they were largely in debt; that they were not able to finance the farm; that they had lost thereon \$16,000 in a few years prior to this transaction; that Mr. Capen wanted to sell the farm; that Mr. Boost said to him that he thought it would be better for Mr. Capen to let some one purchase a half interest and furnish money to conduct the farm. Mr. Capen said to this, "You are the only man I would enter into that kind of a contract with"; that Mr. Boost agreed to purchase an undivided one-half interest in the farm for \$6,000, and to assume one-half of a mortgage of \$6,000 then upon the farm; that it was agreed between them that the farm at that time was worth \$12,000 or \$13,000, and that the purchase money should be put into the farm.

Mr. Boost thereupon paid \$500 upon the purchase price to Mr. Capen, who executed a warranty deed, regular in form, for an undivided one-half interest to Mr. Boost, and had the same recorded and sent it to Mr. Boost at Portland, Oregon. Thereafter Mr. Boost paid personal debts of Mr. Capen amounting to more than \$3,000. And afterwards, in the next two years

and a half, advanced for the use of the farm a total of something over \$8,000.

We have carefully examined the abstract of the evidence in this case, which is full and complete, and to which no exceptions have been taken by the respondent, and we are satisfied therefrom that the evidence in this case is neither clear, cogent nor convincing that this deed, absolute upon its face, was intended as a mortgage; and but for the fact that the trial court, seeing and hearing the witnesses, concluded otherwise, we think there could be no serious question that the great weight of the evidence is with the appellant to the effect that the deed was exactly what it purports to be, a straight deed for an undivided one-half interest in the land.

The testimony of the parties directly interested is in conflict. There is no circumstance favoring the respondent, who seeks to have the deed declared to be a mortgage, except that his evidence was that the property, at the time of the execution of the deed, was of the value of \$35,000 or \$40,000. That fact is disputed by many facts in the case. It had been rented for a number of years for \$300 per year. In 1915, at the time the deed was made, the farm had not been paying the expenses of the respondents and was very much run down. In other words, respondents were unable to make a living on the farm and had gone in debt several thousand dollars. There is evidence, also, from disinterested parties, that the farm at that time did not exceed in value \$13,000. It is true that, in 1917, a sale was made of 160 acres for \$6,500, and in April, 1918, 200 acres were sold for \$10,000, and at about the same time timber was sold to the amount of some \$2,400, but this was some two years after Mr. Capen had sold an undivided interest to Mr. Boost.

June 1920]

Opinion Per MOUNT, J.

On the other hand, the circumstances tend strongly to corroborate Mr. Boost to the effect that the deed was an absolute deed of an undivided one-half interest in the land. As we have said before, no note or other evidence of debt was taken. Immediately after the transfer, Mr. Boost went upon the land and for more than two years spent one-half of each month thereon, working and advising as to the management. After Mr. Boost's deed was recorded, the bank account was changed from Mr. Capen's name to "Capen & Boost," and notes were executed by Capen signed "Capen & Boost." Mr. Capen, upon certain occasions, stated that Mr. Boost was his partner in the farm. In the mass of correspondence that passed between Mr. Capen and Mr. Boost, Mr. Capen frequently addressed Mr. Boost as "Dear Pard." Mr. Boost took an active interest in all the affairs of the farm. These circumstances, we think, indicate clearly that Mr. Capen regarded Mr. Boost not as one holding a mortgage, but as one having an equal interest with him in the farm.

In all the correspondence we find no reference made to a loan. There is no reference anywhere of any interest charged. When the sales of land and timber above referred to were made, the contracts taken back were to Capen & Boost. The money received upon these contracts was paid to Capen & Boost and was used upon the farm. Every circumstance in the case shows conclusively that Mr. Boost was not a mortgagee, but was an undivided one-half owner of that farm. In fact, all the circumstances which are corroborative of the facts in the case strongly tend to corroborate the appellant to the effect that the advances made by him were made not as loans, but as investments in the farm itself. Where the rule is that the evidence must be clear, cogent and convincing that

an instrument upon its face is other than what it purports to be, we are necessarily driven to the conclusion in this case that the court erred in finding this deed to be in fact a mortgage.

The judgment of the lower court is therefore reversed, and the cause remanded with instructions to enter a judgment of partition as prayed for in the complaint.

HOLCOMB, C. J., FULLERTON, BRIDGES, and TOLMAN, JJ., concur.

[No. 15437. Department Two. June 4, 1920.]

CLARK LLOYD LUMBER COMPANY, *Respondent*, v. PUGET SOUND & CASCADE RAILWAY COMPANY, *Appellant*.¹

DAMAGES (92-1)—EXCESSIVE DAMAGES—INJURY TO REAL PROPERTY. A verdict for damages to a mill site and boom location by the construction of a railroad will not be held to be excessive and given under the influence of passion and prejudice, where there was a decided conflict in the evidence, the jury viewed the premises, the question depended largely on the credibility of witnesses, and the case was carefully tried and submitted on proper instructions, and the verdict was amply supported by the testimony.

TRIAL (32)—RECEPTION OF EVIDENCE—REOPENING CASE—DISCRETION. The reopening of a case for further evidence being largely discretionary, error cannot be predicated upon the refusal to reopen a case generally for defendant's new testimony which was not rebuttal of new testimony offered by plaintiff, after reopening the case for a limited purpose for plaintiff's rebuttal and surrebuttal thereon by defendant.

TRIAL (83)—INSTRUCTIONS—FORM AND LANGUAGE. In an action for damages to a mill site and boom location by the construction of a railroad, an instruction as to the measure of damages in case waste material placed in the river could be removed, so as to make it a "safe and secure place," is not error, although whether it could have been removed so as to restore it to its former condition was a question for the jury, the defect, if any, being more in words than substance.

¹Reported in 190 Pac. 226.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered May 27, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for trespass to property. Affirmed.

Kerr & McCord, for appellant.

Ryan & Desmond and *Coleman & Gable*, for respondent.

BRIDGES, J.—In and prior to July, 1912, respondent owned what it claimed was a valuable mill site on the banks of the Skagit river, in the state of Washington. This site consisted of land on the northerly bank of the river, on which its mill had been previously located, but which, in 1910 or 1911, had been destroyed by fire, and which has not been rebuilt. Its boom for holding logs and shingle bolts was located in the northerly portion of the river and adjacent to the mill and mill site. This boom has been designated a "pocket boom." In order to catch the timber floating down the river from above the mill site, it was necessary to have a "fin" or "sheer" boom; this sheer boom was located in a small cove on the southerly side of the river and opposite the mill site. One end of it was tied to the southerly bank and the other end floated out in the stream, caught logs and bolts and guided them to the other side of the river and into the mouth of the pocket boom. It is claimed that the mill site proper, the pocket boom, and the location for the sheer boom, all combine to constitute an excellent mill site. It appears that there was a point or ledge of rock extending out into the stream which protected the land end or head of the sheer boom from drifting, thus forming an unusually good location for a sheer boom. Respondent also owned the southerly shore of the river where its sheer boom was located. In 1912, the appellant, being desir-

ous of constructing a railroad up the southerly bank of the river, purchased a right of way therefor from respondent at the point of and above and below the sheer boom. At about the same time an agreement was entered into between the parties which gave to respondent:

“—a right to use and occupy all the shore line along the Skagit river for booming, logging or other purposes and shall have the right to keep its fin booms tied on the stumps it is now attached to or any other structure it may place on such shore line or lands; provided, however, that such occupancy of the shore line and tying and maintaining of said fin boom on said stumps shall not interfere with the construction, operation and maintenance of the railroad of said second party.”

After the railroad was built, respondent brought this suit against appellant, claiming damages because the latter had destroyed the contour of the southerly bank of the river and had filled with rock the cove where the sheer boom was located, and, in general, had destroyed the value of the whole mill site. Upon trial there was a verdict for the plaintiff. The defendant appealed to this court, where the various rights of the parties were interpreted and the case reversed and remanded for a new trial. *Clark Lloyd Lumber Co. v. Puget Sound & Cascade R. Co.*, 92 Wash. 601, 159 Pac. 774; *Clark Lloyd Lumber Co. v. Puget Sound & Cascade R. Co.*, 96 Wash. 313, 165 Pac. 94. The second trial resulted in a verdict in favor of the plaintiff in the sum of \$5,750, for injury to the whole mill site. Defendant's motion for a new trial was denied and it has again appealed. For a more complete recital of the facts, we refer to the previous decisions of this court.

It is first contended that the verdict is excessive and was given under the influence of passion and preju-

dice. Appellant does not point out anything upon which to base the assertion that the verdict was rendered under the influence of passion and prejudice, except the size of the verdict. The case was very carefully and ably tried by both parties to the suit and by the court. A very large amount of testimony was taken; the jury visited the premises, both at the beginning and at the end of the trial, and the court's instructions were full and complete. The case seems to have been conscientiously and honestly tried by all parties concerned. When it was here the first time, we held that, if the rock could be removed from the cove and the fin boom location restored to its original efficiency, the measure of respondent's damages would be the cost of restoring such situation. But if the situation could not be restored, then the measure of damages would be the difference in the value of the property before and after the work was done. Respondent introduced the testimony of many witnesses on the theory that the situation could not be restored, and also on the theory that the situation could be restored, and the cost of so doing. All of this testimony was met by the testimony of many witnesses produced by the appellant. On the theory that there could not be a restoration of the situation, respondent's witnesses fixed the damage in excess of \$10,000, while the witnesses of appellant contended that the mill site had become practically valueless because of a lack of timber and the inability of any person to successfully operate the property, and consequently the damage was practically nothing. On the restoration theory, respondent introduced competent evidence showing the cost to be in excess of \$10,000, while appellant's witnesses fixed such sum at less than \$1,000. There was a sharp dispute as to the line and nature of the original contour

of the bank of the river, and as to the amount of rock and material which appellant had deposited in the cove and river near the location of the sheer boom. This situation brought about a decided conflict in the evidence, and the chief question was as to the credibility of the witnesses. That such burden rests upon and is peculiarly within the province of the jury and not the court, has been too often decided by this and other courts to need citation of authorities.

In the case of *Seattle & Montana R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, in discussing the question now before us, this court said:

“We do not feel disposed to substitute our own judgment for that of the jury whose duty it is to assess the damage, simply because the amount may seem to us large; especially where there is abundant competent evidence upon which to base the verdict.”

In *Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90, 147 Pac. 652, it was said:

“The evidence on this point, however, was conflicting. Its weight and the credibility of the witnesses were for the jury. The trial judge was much better able to determine the weight and credence to be given to this evidence than we are. He refused to grant a new trial. An appellate tribunal should be extremely slow to override the judgment of both the jury and the trial court on a question of fact where there is any evidence to support it.”

In *Caldwell v. Northern Pac. R. Co.*, 62 Wash. 420, 113 Pac. 1099, we said:

“The right of trial by jury being a constitutional right, the courts, in law actions, may not take questions of fact away from them and determine such questions for themselves merely because they do not agree with the jury’s findings. While we have no doubt of our power to grant new trials where verdicts appear excessive, yet it is a power which should be exercised

within reason, and only where it is reasonably plain that justice will be promoted thereby."

A careful reading of the record convinces us that there was amply sufficient evidence to support the verdict, and for us now to say that the verdict is excessive would be to usurp the province of the jury.

During the trial the parties, acting through their attorneys, entered into a stipulation to the effect that either party might use certain of the testimony produced at the former trial. After the defendant had closed its case, the plaintiff sought to introduce in rebuttal the testimony of one of the witnesses at the former hearing concerning the amount of material which the defendant had thrown into the river at the cove where the sheer boom was located. The trial court held that such testimony was not proper rebuttal, whereupon the plaintiff moved to reopen the case for the purpose of introducing such testimony. The court permitted this to be done. At the time of so ruling, the court announced that the defendant would be permitted to introduce any evidence in answer to this new testimony of the plaintiff. Thereafter the defendant asked the court to reopen the defense and permit it to introduce the testimony of three witnesses to the effect that they had examined the test holes which had been made previously on the southerly bank of the river and examined the character of the earth and rock and found it to be solid rock. The court held that this testimony did not rebut that introduced by the plaintiff after the reopening of the case, and it refused to reopen the case generally for the admission of this testimony. The appellant now claims error on this account. That appellant's proffered testimony was not surrebuttal and was not in answer to the new testimony given by plaintiff's witnesses, is clear to us. The

only way appellant could put in this testimony was to have the case reopened for that purpose. This the court refused to do. It is manifest that these matters must be left largely within the discretion of the trial court. There cannot be any inherent right to have a case reopened, for, if there were, the trial might never come to an end. In the very nature of things, it is, and must be, a permission, the granting of which rests in the sound judgment and discretion of the court. In this instance we cannot find that the court abused its discretion, or that it erred in its ruling.

Complaint is also made of that portion of the court's instruction No. 3, reading as follows:

"If the plaintiff has been damaged by the deposit of waste material, then your first inquiry will be whether said waste material can be removed so as to return said indenture or cove to a condition which will afford a secure and safe place for the head of said fin boom so as to permit its maintenance and successful operation, and if so, then plaintiff's damages on this element would be the cost of the removing such waste material or debris."

It is claimed that this instruction is erroneous because it left to the jury whether or not the rock which had been deposited in the river could be removed, whereas, the testimony all showed that it could be removed. In the first place, if the testimony was as appellant contends, then certainly no harm could have resulted to it by leaving to the jury the question of whether or not the rock could be removed. However, we find that the plaintiff introduced some testimony tending to show that the rock could not be removed so as to restore the original situation, and it was therefore entirely proper for the jury to determine that question. Appellant further complains that this instruction imposes on it the duty to place the cove in

such condition as that it would be "a safe and secure place" for the operation of the sheer boom, whereas, it was only required to restore the premises to the condition they were in before the damage was done. Probably it would have been better if the court had instructed that it was a question for the jury whether the rock could be removed and thus the premises restored to the condition in which they originally were. However, it is plain to us that the jury could not have been misled. The error, if any, is more of words than of substance. The appellant had deposited rock and other material in this cove, which it was claimed destroyed the use of the sheer boom. In the pleadings, in the testimony, and in the general charge of the court to the jury, the question was whether this material could be so removed as to restore the cove to its former condition and usefulness. At no time was it contended that appellant was under obligation to put the cove in better condition than it was before the damage was done. The question was concerning the removal of the rock which appellant had placed in the cove. And in this instruction, as well as in others, the court mentioned "deposit of waste material" in the cove, and whether "said waste material can be removed." Instructions number five and six gave the jury to understand that the question is whether, by the removal of this rock, the cove can be restored to its former condition and efficiency. Reading this instruction in the light of the pleadings, the testimony, the contentions of the parties, and all the instructions given by the court, we cannot conclude that there was any reversible error.

Appellant also complains that the court refused to give its requested instructions numbers 1, 2, 7 and 8. We have carefully considered these assignments of

error, but do not find any merit in them. All portions of the requested instructions proper to be given were, in substance, given by the court in his own words.

It is claimed that it was error for the court to instruct the jury as follows:

“You are instructed that, under the terms of the deed of right of way and the contract executed by the plaintiff and defendant, the plaintiff as grantor having reserved the right to use and occupy the shore line of the river for booming and logging purposes and maintaining its then existing boom and anchorage, the defendant had no right to injure the boom and anchorage or change the shore line of the river.”

The contract mentioned in this instruction is the one from which we have heretofore quoted. Appellant claims that, under the terms of that contract, the respondent was entitled to occupy the shore line, provided such occupancy did not interfere with the construction, operation and maintenance of the railroad. But this contract was otherwise interpreted in the previous appeal. *Clark Lloyd Lumber Co. v. Puget Sound & Cascade R. Co.*, 92 Wash. 601, 159 Pac. 774, where we said:

“Appellant contends that, having a deed to the right of way, it had a superior right to construct its road in the manner in which it did, and that the rights of respondent are subservient and subordinate to it. The right to invade the property right of respondent is not given by the deed, nor does a fair construction of the contract sustain it. The right reserved by respondent was to use and occupy the shore line in the manner in which it was then used. It would have had this right without any contract. This right is not destroyed by the further provision of the contract that such occupancy shall not interfere with the construction, operation and maintenance of the railroad by appellant. The contract must be construed by reference to its whole context.”

June 1920]

Opinion Per MAIN, J.

We do not find any material error, and the judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15701. Department One. June 7, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
C. H. Younger, Plaintiff, v. C. W. CLAUSEN,
*as State Auditor, Respondent.*¹

STATES (11)—OFFICERS (43)—SALARY—INCREASE DURING TERM—ADDITIONAL DUTIES—STATUTES. The state labor commissioner having previously been vested with extensive powers and duties with reference to enforcing laws enacted for the safety of workmen, which were of the same general nature as those imposed upon him by chapter 130, Laws of 1919, p. 309, his salary could not be increased during his term of office, in violation of Const., Art. 2, § 25, on account of the additional duties imposed upon him by that act, as such duties were merely incidental, collateral or germane to his prior duties.

Application filed in the supreme court December 30, 1919, for a writ of mandamus to compel the state auditor to issue certain salary warrants to the state labor commissioner. Denied.

W. V. Tanner, for relator.

The Attorney General and *G. H. Bucey*, for respondent.

MAIN, J.—This is an original application in this court for a writ of mandamus. The relator is the state labor commissioner and the respondent the state auditor. The relator claims the right to have issued to him certain salary warrants by virtue of chapter 130, p. 309, of the Laws of 1919. The relator's term as

¹Reported in 190 Pac. 324.

commissioner of labor of the state of Washington began on April 3, 1917, and under the statute, Rem. Code, § 6550, his term of office was for a period of four years. The salary of the office, at the time of his appointment, was \$2,400 per annum. It thus appears that, at the time the act of 1919 became effective, under which the warrants in this action are claimed, the relator was the commissioner of labor, serving a term which would not expire until April 3, 1921. The respondent declined to issue the warrants demanded, relying upon § 25 of art. 2 of the state constitution, which, among other things, provides that:

“ . . . nor shall the compensation of any public officer be increased or diminished during his term of office.”

The question here is not whether the legislature may increase the powers and duties of an officer during his term. That this may be done is well settled. The real question is whether the legislature may increase the powers and duties of an office and allow additional compensation therefor during the term that an officer may be serving, notwithstanding the constitutional provision. The relator claims that his added powers and duties under the act of 1919 are extrinsic and foreign to his duties under the prior laws, and that therefore the constitutional provision does not apply. The respondent claims that the new duties of the relator under the act of 1919 are incidental, collateral or germane to the duties which he was required to perform under the prior law, and that therefore the salary increase during his present term is inhibited by the constitution. The general rule supported by the authorities is that, where new duties are added to the office during the term and the act fixes the compensation therefor, the constitutional inhibition does not apply if

June 1920]

Opinion Per MAIN, J.

such new duties are extrinsic or foreign to the prior duties. On the other hand, if the new duties are incidental, collateral or germane to the duties which the officer was required to perform under the prior law, the salary increase cannot be sustained. The question is not so much over the statement of the rule as it is the application thereof. Probably the best statement of the rule will be found in §§ 862 and 863 of Mecham on Public Officers, as follows:

“An officer who accepts an office, to which a fixed salary or compensation is attached, is deemed to undertake to perform its duties for the salary or compensation fixed, though it may be inadequate, and if the proper authorities increase its duties by the addition of others germane to the office, the officer must perform them without extra compensation. Neither can he recover extra compensation for incidental or collateral services which properly belong to or form a part of the main office. . . .

“Where, therefore, a public officer is employed to render services in an independent employment, not germane or incidental to his official duties, . . . he may recover for such services.”

Inquiry, then, must be directed to whether the powers and duties of the relator under the act of 1919 were extrinsic or foreign to the duties which he was required to perform under the then existing law, or whether they are incidental, collateral or germane thereto. The powers and the duties of the relator under the act of 1919 will first be reviewed, and these will be followed by the review of his duties under the law as it was at the time of his appointment.

The act of 1919 (Laws of 1919, ch. 130, p. 309), is entitled, “An act relating to industrial insurance, to medical and surgical care of injured workmen, providing certain means for the prevention and avoidance of injuries to workmen,” and amending and adding cer-

tain sections to Reimington & Ballinger's Code. Under § 4 of this act, it is the duty of every employer to furnish a place of work which shall be as safe for the workmen therein as may be reasonable and practicable under the circumstances, surroundings and conditions. The employer is also required to furnish and use such safety devices and safeguards and to adhere to and use such practices, means and methods as, under the circumstances, are reasonable and practicable in order to "render the work and the place of work safe." The employer is further required to comply with such standards of safety for the place of work and such safety devices and systems of education for safety as shall be from time to time prescribed for such employer by the state safety board. Section 6 of the act creates a state safety board which shall consist of two members other than chairman thereof. The commissioner of labor, under § 7, is required to act as an advisory member of the state safety board, but in such capacity only, and shall not be allowed to vote on any question coming to the board. It is expressly provided in the section that the commissioner of labor shall "not be included in the designation 'State Safety Board' wherever used." Under § 8, the state safety board, for all work other than coal mining, is required to make and promulgate standards of safety, to wit:

"(1) To make safe the place of work of workmen, same to be termed 'safe place standards';

"(2) Of safety devices and safeguards to make safe machines, tools, apparatus and appliances, same to be termed 'safety device standards';

"(3) Of educational systems for the education and training of employer and workman in the appreciation and avoidance of danger and in the maintenance and use of safe place and safety device standards."

Section 34 provides that the state labor commissioner, under the provision and control of the state

June 1920]

Opinion Per MAIN, J.

safety board, shall have the sole charge of the "enforcement of safe place and safety device standards (other than for the mining of coal) and of inspection and certification thereof." Under § 50, it is made the duty of the labor commissioner to inspect the establishment of work of every employer engaged in extra-hazardous work in the state (other than coal mines), as often as directed by the state safety board, but not less than once every four months. Section 39 covers the matter of the additional salary for the labor commissioner, and is as follows:

"For the performance of his duties under section 6604-81 (Sec. 34) the state labor commissioner shall receive a salary of one hundred and fifty dollars per month in addition to his salary as state labor commissioner."

Reading § 34 and § 39 together, it appears that the labor commissioner's additional salary, under the act, was for the performance of his duties in the enforcement of safe place and safety device standards (other than for coal mines) and of the inspection and certification thereof. The warrants which the relator is seeking to have issued to him by the state auditor are for salary for certain months claimed to be due him under the statute. The duties imposed upon the labor commissioner by the act will be found in §§ 7 and 34, above referred to, and may be set out as follows:

(1) To act in an advisory capacity only to the state safety board. (2) Under the supervision and control of the safety board, enforce (a) safe place standards, (b) safety device standards, other than for coal mining, (c) inspection and certification thereof.

Speaking generally, these duties have to do with the safety and welfare of employees and workmen. The purpose of the safe place standards and the safety

device standards is to make "the work" and "the place of work" safe and thus avoid unnecessary accidents and injuries.

Reference will now be made to the duties of the state labor commissioner under the law as it was at the time of his appointment and which he is still required to perform. Under title L of Remington's 1915 Code, certain acts of the legislature are codified under the general title of Labor Law. Under this title there are a number of separate chapters, among which are those entitled "Bureau of Labor," "Female and Child Labor," "Health and Safety of Employees in Factories, etc.," "Arbitration and Disputes," "Workmen's Compensation Act." Two chapters of the code not codified under the above general title of the labor law are chapter 8 (Rem. Code, § 5482 *et seq.*), "Regulation and Conduct of Bakeries," under the general title of "Health," and chapter 8 (Rem. Code, § 8213 *et seq.*), under the general title of "Navigation." The general duties of the labor commissioner are defined in § 6553 of Remington's Code, which is one of the sections entitled "Bureau of Labor." Under this section it is made the duty of the labor commissioner to enforce all laws regulating employment of children, minors, and women, or laws established for the protection of the health, lives and limbs of operators in workshops, factories, mills and mines, on railroads and other places, and "all laws enacted for the protection of the working classes." In certain respects it is made the duty of the commissioner to enforce laws "hereafter to be enacted." It is further made the duty of the commissioner to collect, assort, arrange and present in biennial reports to the legislature statistical details

"relating to all departments of labor in the state; to the subjects of corporations, strikes or other labor difficulties; to trade unions and other labor organiza-

June 1920]

Opinion Per MAIN, J.

tions and their effect upon labor and capital; and to such other matters relating to the commercial, industrial, social, educational, moral and sanitary conditions of the laboring classes, and the permanent prosperity of the respective industries of the state as the bureau may be able to gather."

By § 6571-4, which is one of the sections under the chapter headed "Female and Child Labor," the labor commissioner is made an *ex-officio* member of the "Industrial Welfare Commission," the duties of which commission, as set forth in § 6571-3, are

"to establish such standards of wages and conditions of labor for women and minors employed within the state of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women."

By § 6590 of Remington's Code (1915), which is one of the sections under the chapter entitled "Health and Safety of Employees in Factories, etc.," it is made the duty of the commissioner of labor to examine

"all factories, mills, workshops, storehouses, warehouses, stores and buildings and the machinery and appliances therein contained to which the provisions of this chapter are applicable for the purpose of determining whether they do conform to such provisions, and of granting or refusing certificates of approval, whether requested to do so or not."

Further provisions of the chapter provide certain standards for factories, mills, workshops, etc., for the safety and welfare of employees. By § 6599 of Remington's Code (1915), which is one of the sections under the chapter entitled "Arbitration and Disputes," the labor commissioner is required to perform certain duties with reference thereto. By § 5487, Remington's 1915 Code, which is one of the sections under the chapter entitled "Regulation and Conduct of Bakeries," it

is made the duty of the commissioner of labor to inspect bakeries and issue a certificate to the owner, if such be the fact, that he is complying with all the provisions of the chapter. The commissioner is also authorized to issue orders to improve the condition of a bakery. Under § 8213, which is one of the sections under the chapter entitled "Regulation of Steam Vessels, etc.," the commissioner of labor is charged with the administration of the provisions of the act. The act provides for a system of inspection and regulation of certain steam vessels which are properly subject to state regulation.

It will thus be seen that, prior to the passage of the act of 1919, the powers and duties of the labor commissioner with reference to enforcing laws enacted for the safety of workmen were extensive. It may be said of these laws that the general purpose running through them was the welfare and safety of the employees or workmen. Under these laws, the labor commissioner was required to make certain inspections and enforce certain standards for the safety of work and the places of work. He was required to issue certificates as therein provided. He was also required to enforce all laws enacted "for the protection of the working classes." These duties were of the same general nature as those imposed upon him by the law of 1919. As already pointed out, that law, as well as the prior laws which defined his duties, were enacted for the general purpose of the safety and welfare of employees or workmen. In acting in an advisory capacity to the state safety board, under the act of 1919, he was but serving the same general purpose that the prior laws required of him. It is true that, under the act of 1919, his powers and duties have been increased, but this fact alone will not sustain an act of the legislature,

June 1920]

Opinion Per MAIN, J.

under the constitutional provision above referred to, which increases his compensation during his term of office. *State ex rel. Davis v. Clausen*, 47 Wash. 372, 91 Pac. 1089; *State ex rel. Funke v. Board of Commissioners*, 48 Wash. 461, 93 Pac. 920. In the case first cited, the powers and duties of the state board of control were increased and the salary of the members was increased. It was there held that the members of the board were not entitled to the increased compensation by reason of the fact that the powers and duties had been increased. Before such increase in salary can be sustained it is necessary, as already pointed out, that the duties under the new act shall be extrinsic or foreign to those to be performed under the existing law and shall not be incidental, collateral or germane thereto.

It is said, however, that under the act of 1919, the labor commissioner is required to perform certain duties relative to the industrial insurance commission, such as that at the end of each calendar year it shall be his duty to certify to such commission the compliance or noncompliance with the safety standards by employers. From this it is argued that the labor commissioner is thereby required to perform duties in connection with another department of the government, because, under the prior law, he was not required to perform any duties in connection with the industrial insurance commission. It cannot be held, however, that the duties which the commissioner of labor is required to perform in connection with the industrial insurance commission are extrinsic and foreign to the duties which he was required to perform under the prior law. It will hardly be denied that one of the purposes of the workmen's compensation act (Rem. Code, § 6604-1 *et seq.*), was to promote the welfare and

safety of employees or workmen. This is the same general purpose which is sought to be accomplished by other labor laws. The case of *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428, is readily distinguishable. It was there held that a law, passed during the term of a county treasurer, which imposed upon him the duty of the collection of city taxes and allowed him a salary for such purpose in the sum of \$500 a year in addition to the salary otherwise provided by law, was not subject to the constitutional provision providing that the salary of a public officer should not be increased or diminished during his term of office. The reason for the holding was that the collection of city taxes was a matter which was "entirely outside" of his duties as county treasurer for which his previous salary had been fixed. The functions of the county do not bear that close relation to those of a city as the purposes of the labor laws of the state, including the workmen's compensation act, do one to the other. In *Spokane County v. Allen*, 9 Wash. 229, 37 Pac. 428, 43 Am. St. 830, commenting upon the doctrine of the *Carson* case, it was said:

"We do not think that the doctrine enunciated in that case should in any event be extended, though it is plainly distinguishable from the case at bar."

To apply the doctrine of the *Carson* case to the case now before us would require an extension of the doctrine of that case. It is the positive policy of the constitution, expressed in a number of ways, that the salaries of officers should not be increased during their term of office. This is made apparent by reference to other similar provisions, but which are not here directly involved. Section 25 of art. 2, which is the section here immediately involved, provides that the compensation of any public officer shall not be in-

June 1920]

Opinion Per MAIN, J.

creased or diminished during his term of office. Section 25 of art. 3 provides that the compensation of state officers shall not be increased or diminished during the term for which they shall have been elected. Section 13 of art. 4 provides that the judges of the supreme court and judges of the superior courts shall severally, at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected. Section 8 of art. 11 provides that the salary of any county, city, town or municipal officer shall not be increased or diminished after his election or during his term of office. After reviewing these various provisions of the constitution in *State ex rel. Davis v. Clausen*, 47 Wash. 372, 91 Pac. 1089, *supra*, it was said:

“So that it will be seen that it was a positive policy of the constitution, expressed in every possible way, that the salaries of officers should not be increased during their term of office. This wise provision was no doubt intended to prevent pernicious activity on the part of the office holders of the state being brought to bear upon the members of the legislature—a wise provision which must not be construed out of existence or evaded by legislative enactment.”

A similar comment is found in *State ex rel. Port of Seattle v. Wardall*, 107 Wash. 606, 183 Pac. 67, as follows:

“Other courts have said that such provisions also have an additional purpose, namely, to prevent the salary fixing body from rewarding their friends and punishing their enemies, which they were sometimes wont to do, by increasing the salaries of those in favor and decreasing the salaries of those whose actions did not meet with the approval of that body.”

A careful consideration of the duties imposed upon the labor commissioner by the law of 1919, in comparison with those which he was required to perform under the prior law, leads to the conclusion that his duties under the 1919 act are not extrinsic and foreign to his previous duties, but that they are germane thereto. To review the authorities in detail, cited in the briefs, would unduly extend this opinion, already probably unreasonably long. The question has frequently been before the courts of other states under similar constitutional provisions. In some cases it is held that the duties created by the later act are extrinsic and foreign, while in others, that they are incidental, collateral or germane, each line of cases applying the general rule as above quoted from Mecham. It is apparent that, in determining whether the duties are extrinsic and foreign or collateral and germane, each case must depend, to a considerable extent, upon its own facts. As a type of the cases holding duties to be extrinsic and foreign, the case of *State v. Roddle*, 12 S. D. 433, 81 N. W. 980, may be cited. In that case, by act of the legislature, the secretary of state was made a member of what was referred to as the "Brand and Mark Committee," and compensation was allowed him for his duties in connection with that committee in addition to his salary as secretary of state. It was there held that his duties as a member of the "Brand and Mark Committee" were extrinsic to those which he was required to perform as secretary of state. As a type of the cases holding that duties are germane or collateral, the case of the *Board of Commissioners of Creek County v. Bruce*, 51 Okla. 541, 152 Pac. 125, may be referred to. In that case, additional duties were conferred upon county clerks of the state, in that they were required to issue hunting licenses. It was there

June 1920]

Opinion Per MAIN, J.

held that such duties were germane to the office of county clerk. Not all the cases support the general rule as first above quoted. For instance, the supreme court of Missouri holds that, where new and additional duties are imposed upon an officer and the act provides compensation therefor, such act is not subject to the constitutional provision prohibiting increase in the pay of an officer during his term of office. *State ex rel. Harvey v. Sheehan*, 269 Mo. 421, 190 S. W. 864. But this court has taken a different view of a similar constitutional inhibition, as pointed out in the *Funke* and *Davis* cases, *supra*, where it is held that new and additional duties are not sufficient to sustain the application of the act to the officer holding under a term at the time of its passage.

This opinion can be no better concluded than by a quotation from the *Funke* case, *supra*, as follows:

“The increase of compensation by those statutes and also by the one now before us was, no doubt, in each instance a meritorious thing for the legislature to do, having reference to future office incumbents. But the constitutional provision as to present incumbents must not be so construed in the interest of seeming expediency or even apparent necessity as shall practically amount to an evasion of the organic law. That the constitutional provision exists is not only true, but it is also true that it is so clear and is founded upon such practical wisdom as calls for no elastic effort to construe it.”

The writ will be denied.

HOLCOMB, C. J., MITCHELL, PARKER, and MACKINTOSH, JJ., concur.

[No. 15702. Department One. June 7, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
James Bagley, Plaintiff, v. C. W. CLAUSEN,
*as State Auditor, Respondent.*¹

STATES (11)—OFFICERS (43)—SALARY—INCREASE DURING TERM—
ADDITIONAL DUTIES—STATUTES. The duties of the state mining in-
spector under the coal mining code, Laws of 1917, p. 109, being
practically the same as under chapter 130, Laws of 1919, p. 309, the
legislature could not by the later act, increase his salary during his
term of office by reason of the addition of new duties which were
only incidental, collateral or germane to his prior duties; and the
additional duty of certifying certain facts from the records of his
office is germane and incidental only.

Application filed in the supreme court December 30,
1919, for a writ of mandamus to compel the state audi-
tor to issue certain salary warrants to the state mine
inspector. Denied.

W. V. Tanner, for relator.

The Attorney General and *G. H. Bucey*, for respond-
ent.

MAIN, J.—This is an original application in this
court for a writ of mandamus. The relator is the state
mine inspector and the respondent the state auditor.
This is a companion case to that of *State ex rel.*
Younger v. Clausen, ante p. 241, 190 Pac. 324, which
will herein be referred to as the case of the state labor
commissioner. The two cases were covered in the
same briefs and were argued together. In this case
it will not be necessary to do more than examine the
powers and duties of the mine inspector as they were
defined by law prior to the act of 1919 (Laws of 1919,
ch. 130, p. 309), and compare them with his powers and
duties under that act.

¹Reported in 190 Pac. 329.

June 1920]

Opinion Per MAIN, J.

The relator, by this action, claims the right to certain salary warrants under the act of 1919. The term of the mine inspector is for a period of four years, the relator having begun his term on July 6, 1917. The act of 1919, upon which he relies, was passed during the term which he was then serving and was designed to increase his salary during that term. The respondent, the state auditor, refused to issue the warrants, claiming that the act was inhibited by that provision of the constitution which provides that the compensation of a public officer shall not be increased or diminished during his term of office. The case presents the same general question as was presented in the case of the state labor commissioner.

For the purpose of determining whether the new duties imposed upon the state mine inspector fall within that class which is outside or extrinsic to his duties under the prior law, or whether they fall within the class of incidental, collateral or germane duties, attention will be first given to his duties under the law as they existed at the time of his appointment, and this will be followed by a review of the duties imposed upon him by the act of 1919. The office of inspector of coal mines was originally created in 1897 (Laws of 1897, ch. 45, p. 58), but the relator holds his present office under chapter 36, Laws of 1917, p. 109, known as the Coal Mining Code. This code is a comprehensive act and describes in detail the requirements to be observed in the operation of coal mines, various regulations being therein provided concerning safety, health, inspection, hours of labor, etc. Under § 7, p. 116, of the code it was made the duty of the mine inspector to enforce the provisions of the act and he was required to devote his entire time to the duties of the office. Under § 8, p. 117, it was his duty to "enter, inspect and examine

any coal mine in this state, and the workings and the machinery belonging thereto." It was further made his duty to make and keep a record of each visit, noting the time and material circumstances of the inspection. In other provisions of the code certain safe place and safety device standards were prescribed which were to be observed in the operation of a coal mine. The act fixes the mine inspector's salary at \$3,000 per year. In general, under the act, the mine inspector was required to make inspections, keep a record thereof, and enforce the provisions of the act, including the safe place and safety device standards prescribed therein. He was further required, by § 10 of the code, to transmit a synopsis of his annual report to the governor of the state not later than March first of each year.

Reference will now be made to the duties imposed upon the mine inspector by the act of 1919. By § 7 of this act, the state mine inspector bears the same relation to the state safety board as does the commissioner of labor. Section 8 provides for the promulgation of the standards of safety as set out in the case of the state labor commissioner. Section 9 provides that the safe place standards and the safety device standards for coal mines of the state shall be those prescribed by the coal mining code. By § 10, the educational standards for coal mines are to be prescribed by the board created, to be known as the state mining board, consisting of two members to be appointed by the state safety board. By section 18, any coal mine employer, or workman, or association of either, or any joint committee of such employers and workmen, or the state mine inspector, are authorized to make recommendations to the state mining board of educational standards. By § 28, it is provided that the state mine inspector shall have sole charge of the enforcements of

June 1920]

Opinion Per MAIN, J.

the standards of safety for coal mining and of the inspection incident thereto. By section 49, it is made the duty of the state mine inspector, by himself or deputy, to inspect every coal mine in the state not less than once every four months, for the purpose of ascertaining whether the safety standards applicable thereto are being complied with. This section further provides that the state mine inspector, at the end of each calendar year, shall certify to the state industrial insurance commission the compliance or noncompliance with the safety standards on the part of each coal mine employer in the state during that year. Section 32 of the act provides that the mine inspector shall receive a monthly salary of \$100 per month for the performance of his duties in enforcing the use of "safety standards and inspecting and certifying the same," this monthly salary to be in addition to the salary which is provided for him by the coal mining code.

It thus appears that the additional salary is for his duties in enforcing (a) the use of safety standards, (b) inspecting, and (c) certifying the same. The safety standards which the mine inspector was required to enforce under this act were the same as those which he was required to enforce under the prior law. The act of 1919 (Laws of 1919, p. 309), § 9, expressly provides the safe place standards and the safety device standards for coal mines shall be those prescribed by the coal mining code. The mine inspector's duty as to inspections under the act of 1919 are practically the same as those which he was required to perform under the prior law, and is still required to perform. Substantially, the only new or additional duty which is imposed upon the mine inspector for which the additional salary is allowed is the requirement that he shall make a report annually to the state industrial insur-

ance commission. The facts which he shall report are those which, under the coal mining code, he is required to ascertain by inspection and keep a record thereof. It will not do to hold that, because one state officer is required to perform the additional duty of certifying certain facts from the records of his office to another officer of the state or agency of the government, he is thereby performing new and additional duties which are extrinsic to, and outside of, the duties that he is required to perform in collecting and recording such facts. The certification of these facts to another state officer or agency of the government is but incidental or germane to the duties of his office. If, by such a device, the salary of a public officer during his term can be increased, the constitutional provision inhibiting the increase or diminishing of salaries during a term of office would be of little consequence. As stated in the case of *State ex rel. Davis v. Clausen*, 47 Wash. 372, 91 Pac. 1089, cited in the case of the state labor commissioner, this provision of the constitution "must not be construed out of existence or evaded by legislative enactment." The additional duties of the mine inspector, created by the act of 1919, more clearly fall within that class of duties which is incidental or germane to his duties under the prior law than do those of the state labor commissioner.

The writ will be denied.

HOLCOMB, C. J., MITCHELL, PARKER, and MACKINTOSH, JJ., concur.

June 1920]

Opinion Per MOUNT, J.

[No. 15876. Department Two. June 7, 1920.]

A. P. AMES *et al.*, *Appellants*, v. DUFF AND YOUK,
Copartners, et al., Respondents.¹

APPEAL (418)—REVIEW—FINDINGS. Where there is a direct conflict in the evidence, findings supported by sufficient evidence will not be disturbed on appeal.

COSTS (69)—ON APPEAL—FAILURE OF RESPONDENT TO APPEAR. No costs on appeal will be allowed to a respondent who makes no appearance in the supreme court.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 21, 1920, upon findings in favor of the defendants, dismissing an action for conversion, tried to the court. Affirmed.

Browder Brown and *J. W. A. Nichols*, for appellants.

MOUNT, J.—This action was brought to recover \$2,325 as damages alleged to have been suffered by the plaintiffs because of a fraudulent conversion of plaintiffs' property by the defendants. Upon issues joined, the case was tried to the court without a jury, and resulted in a judgment of dismissal. The plaintiffs have appealed.

The respondents have not appeared in this court. The facts as shown by the record may be briefly stated as follows: In April of 1918, the appellants were the owners of about thirty acres of land in Lewis county. The respondents were real estate brokers in the city of Tacoma. The appellants listed their little farm in Lewis county with the respondents for sale or exchange for property in Tacoma. The list price was \$3,500 for the farm, including household goods, farm implements and live stock. A day or two later, respondents stated to appellants that they had thirty-five lots with a little

¹Reported in 190 Pac. 230.

bungalow thereon, listed for sale by one J. A. Hannah; that these lots were worth \$3,500, and that they thought they could arrange for a trade. Appellants were agreeable to the trade. Thereafter respondents saw Mr. Hannah and suggested a trade for the Lewis county farm owned by the appellants. Mr. Hannah stated to the respondents that he did not want the household goods or personal property; that he wanted cash for his lots in Tacoma; that he would be willing to accept \$500 in cash and the balance, \$850, by a mortgage upon the Lewis county farm. Thereupon the respondents stated to the appellants that they might retain the household goods, pay \$500 in cash, give a mortgage upon their farm for the balance, \$850, make a deed in blank, and the respondents could use this deed in order to get their commission. It was understood between Mr. Hannah and the respondents that the purchase price of the thirty-five lots was to be \$1,350-net to Mr. Hannah, and that respondents might receive the balance of what they could obtain for the lots as their commission. The trade as finally consummated was made in that way; namely, the appellants agreed to take the thirty-five lots and the building thereon for their farm in Lewis county, without the household goods. They thereupon executed a mortgage for \$600 upon the thirty-five lots, obtained the money therefor, \$500 of which was paid to Mr. Hannah along with the mortgage for \$850 upon the Lewis county farm. A deed to the farm was executed by the appellants in blank and delivered to the respondents.

After the trade was completed, deeds exchanged, and the appellants took possession of the thirty-five lots in Tacoma, the respondents traded the equity in the thirty-acre farm to one Reman, in Tacoma, for the house and two lots. Mr. Reman took the farm subject

June 1920]

. . Opinion Per MOUNT, J.

to the \$850 mortgage, which he assumed and agreed to pay, and respondents took a house and lot exchanged to them by Mr. Reman, subject to a mortgage of \$450, which they agreed to pay. The appellants then brought this action, alleging that they did not know of any agreement by which the respondents were to receive the equity in the farm; that the respondents were their agent and should have informed them fully of the conditions of the trade, and that, by reason of the fact that the respondents acquired an interest in the farm without their knowledge, they were entitled to the proceeds of the farm received by the respondents, which they allege is \$2,325.

The appellants, in their brief, concede that, if they knew and consented to the deal between Hannah and the respondents, they are not entitled to recover. The trial court, on seeing the witnesses and hearing all of the evidence upon that question, found as follows:

“That the plaintiffs examined the Tacoma property they were taking title to before the transaction was consummated; that the plaintiffs knew that the defendants, as agents for Hannah, had to give net to their client the sum of \$1,350, and that they took the deed and bill of sale in blank for the purpose of working out and realizing their commission from their client, Hannah, and that the plaintiffs knew at all times that the deed and bill of sale were made in blank for the purpose above stated. That no material fact was withheld by the defendants from the plaintiffs, and that there was no deceit or fraud practiced, nor was there a secret profit made by the defendants from the plaintiffs, nor were they deceived in any way.”

We have examined both the statement of facts and the abstract of the evidence in this case carefully, and while there is direct conflict in the evidence upon the question whether the appellants knew all the facts and circumstances connected with the transaction and were

fully informed by respondents thereof, there is sufficient evidence to justify a finding to that effect by the court. We are satisfied that there is not sufficient evidence to overturn the findings of the trial court upon that question.

The judgment appealed from must therefore be affirmed. No costs will be allowed to the respondents because they have made no appearance in this court.

TOLMAN and BRIDGES, JJ., concur.

[No. 15732. Department Two. June 7, 1920.]

PIONEER MINING & DITCH COMPANY, *Appellant*, v.
J. M. DAVIDSON, *Respondent*.¹

GUARANTY (20)—PRINCIPAL AND SURETY (63)—RIGHT TO CONTRIBUTION. The right of contribution arises in favor of a joint guarantor who pays the common debt, although he took an assignment of it and the obligation of the principal debtor was not cancelled or satisfied.

ASSIGNMENTS (13)—IN WRITING—REQUISITES—NAMING DEBTOR—STATUTES. Rem. Code, § 191, providing that any assignee of a specialty or other chose in action for the payment of money, by assignment in writing, may maintain an action thereon in his own name, against the obligors or debtors therein named, does not require that the assignment name the obligor or debtor to be sued; the reference being to debtors named in the obligation assigned.

SAME (20)—INTEREST TRANSFERRED—CHOSE IN ACTION. A chose in action passes by a general assignment by one mining company to another of all its personal property, and includes a right of contribution by a joint guarantor's payment of a common debt.

LIMITATION OF ACTIONS (16) — WRITTEN AGREEMENTS — IMPLIED LIABILITY... An action by a joint guarantor who paid the common debt to enforce contribution against co-guarantors is upon an implied liability arising out of a written contract, within Rem. Code, § 157, and can be maintained at any time within six years after the cause accrued.

¹Reported in 190 Pac. 242.

June 1920]

Opinion Per FULLERTON, J.

ASSIGNMENT (2)—THINGS ASSIGNABLE—RIGHT OF CONTRIBUTION. A right of action for contribution in favor of one guarantor against another is assignable.

SAME (5)—THINGS ASSIGNABLE—PERSONAL NATURE—RIGHT TO CONTRIBUTION. The right to contribution being based upon the principle that equality is equity, is not defeated on the theory that the guaranty was personal and could not be so assigned as to confer upon an assignee the right to contribution.

GUARANTY (20)—PRINCIPAL AND SURETY (63)—RIGHT TO CONTRIBUTION—ASSUMPTION OF DEBT BY THIRD PERSON. Where a joint guarantor contracted with a third person to satisfy the obligation, such person, in paying the proportion of the co-guarantors, was not paying its own debt or the debt of its privy, and it was therefore entitled to exact contribution from the other obligors whose debt was paid.

APPEAL (388)—REVIEW—QUESTIONS RAISED BY RESPONDENT. On appeal by plaintiff from a judgment of dismissal on challenge to the sufficiency of the evidence, error assigned by defendant in overruling a demurrer to the answer cannot be reviewed.

HOLCOMB, C. J., dissents

Appeal from a judgment of the superior court for King county, Frater, J., entered September 5, 1919, upon granting a nonsuit, dismissing an action for contribution. Reversed.

Edward H. Chavelle and Williamson, Williamson & Freeman, for appellant.

Edward Judd and O. L. Willett (M. M. Lyter, of counsel), for respondent.

FULLERTON, J.—In years 1902 and 1903, the respondent, Davidson, acquired an interest in certain mineral locations and water rights in the Kugarok mining district of Alaska. In the following year he interested one W. H. Metson and one J. E. Chilberg therein, and the three organized a corporation, called the Kugarok Mining and Ditch Company, for the purpose of developing and working the properties. In the year 1905, the company spent large sums of money in the prosecution of development work, and, needing additional

funds, sought to borrow from the Scandinavian American Bank of Seattle. The bank, as a condition to its advancing the money, required a guaranty from the promoters of the mining company for its repayment. In compliance with the requirement, the respondent, together with Metson and Chilberg, executed and delivered to the bank the following instrument:

“To Scandinavian American Bank, Seattle, Wash.:

“I request you to give credit to the Kugarok Mining and Ditch Company, successors or survivors, for a sum of money not exceeding the amount of (\$50,000) fifty thousand and 00/100 dollars, and as said Kugarok Mining and Ditch Company contemplates a course of dealing with you, I request you to continue the said credit and renew the same from time to time for the said or any other amount. And I hereby promise to pay to you on demand in United States gold coin, all moneys which shall at any time, whenever said demand is made, be due from said Kugarok Mining and Ditch Company, successors or survivors, on whatever account, but not exceeding said amount of (\$50,000) fifty thousand dollars and accrued interest, in whatever form said indebtedness may be, and whether said Kugarok Mining and Ditch Company be party thereto either alone or in partnership, or in common, or jointly, with any others. These presents shall constitute a continuing guaranty, and shall not be considered satisfied by and payment by or for account of said Kugarok Mining and Ditch Company. You may, without affecting this guaranty, grant time or other indulgence to or compound with said Kugarok Mining and Ditch Company, successors or survivors, or release or surrender any collateral security or obligation held by you against any ultimate balance which shall remain due to you from said Kugarok Mining and Ditch Company, successors or survivors, within the limit aforesaid, and accrued interest, notwithstanding whatever intermediate credits, loans, advances or transactions. And this guaranty shall continue after my death until you shall have received notice of revocation from my

June 1920]

Opinion Per FULLERTON, J.

personal representatives, which revocation shall then apply only to advances made after receipt of such notice. And this guaranty shall not be discharged by your omission to take action upon the principal debt or any collateral that you may hold for its payment, and no notice need be given to me of any default on the part of said Kugarok Mining & Ditch Company, successors or survivors.

“Dated San Francisco, Nov. 20th, 1905.

“J. E. Chilberg,

“W. H. Metson,

“J. M. Davidson.”

The respondent, Davidson, held the offices of president and manager of the corporation, and had the active management of its affairs. From time to time following the execution of the guaranty, the corporation borrowed from the bank various sums of money, giving its notes therefor. On January 29, 1912, these loans aggregated seventy-five thousand five hundred dollars, and on that date a renewal note, payable on demand, was given the bank for that sum.

On May 31, 1910, Metson, by an instrument in writing, sold, assigned and turned over to a corporation known as the Pioneer Mining Company all of his interests in the Kugarok Mining and Ditch Company, together with other property. In consideration of the assignment, the Pioneer Mining Company agreed to issue and deliver to Metson, of its capital stock then in its treasury, three hundred and seventy-six thousand shares, and assume and pay all

“outstanding obligations or claims, guarantees or indemnifications which the said party of the first part shall or would have to pay for or on account of the said Kugarok Mining and Ditch Company, . . .”

On January 13, 1913, the Pioneer Mining Company, on demand of the Scandinavian American Bank, paid

to the latter the amount of the note it held against the Kugarok Mining and Ditch Company; the bank, however, did not stamp the note as paid, but indorsed it without recourse and delivered it over to the Pioneer Mining Company. Later on, the Pioneer Mining Company transferred all of its property to the plaintiff and appellant in this action, the Pioneer Mining and Ditch Company. This conveyance was also in writing, and, after the describing of various specified properties, concluded with the following general description:

“Together with all other personal property now owned or possessed by the Pioneer Mining Company in the district of Alaska, the intent being to convey to the party of the second part all personal properties of the party of the first part owned by said party of the first part in the district of Alaska or elsewhere.”

The present action was instituted on November 20, 1918, by the appellant to recover from Davidson upon the guaranty before quoted. In its complaint it set forth the facts substantially as we have outlined them, and alleged, in addition thereto, that the Kugarok Mining and Ditch Company was, at the time of the transfer of the note, wholly insolvent; that it has been at all times since, and is now, wholly insolvent, and that it had been unable to collect from it any part thereof. Judgment was demanded for one-third of the amount paid to the Scandinavian American Bank by the plaintiff's predecessor in interest at the time the note was transferred to it.

Issue was taken upon the complaint and a trial entered upon by the court sitting with a jury. At the conclusion of the plaintiff's case, the defendant challenged the sufficiency of the evidence to sustain a judgment against him, which challenge the trial court sustained, and afterwards entered a judgment of dismissal

June 1920]

Opinion Per FULLERTON, J.

with costs. From this judgment, the present appeal is prosecuted.

Since the record is silent as to the reasons which actuated the trial judge in sustaining the challenge to the sufficiency of the evidence, the questions suggested can best be noticed by noticing the reasons urged by the respondent's learned counsel as supporting his ruling. The first of these is that the record fails to show a payment by the appellant's assignor of the obligation due from the Kugarok Mining & Ditch Company to the Scandinavian American Bank. The record on this matter is, it will be remembered, that the assignor of the appellant, in consideration of a transfer of certain property to it by Metson, assumed the liability of Metson as guarantor of the note, and that afterwards, on demand of the bank, paid the amount of the note to the bank and took an assignment of the note. The respondent calls attention to the general rule that the right of contribution between sureties arises only after the payment of the common obligation, or after something is done in relation thereto by the surety claiming contribution equivalent to a payment; and argues that, since the obligation still exists against the Kugarok Mining Company, there was here no payment. But this argument mistakes the rule. It is not necessary that the obligation of the principal debtor be canceled or satisfied, as against the principal debtor, to give rise to the right of contribution. The obligation arises when payment is made to the creditor to whom the guaranty runs. Here there was such a payment. The bank, the guaranteed creditor, no longer has any claim either against the guarantors or the Kugarok Mining & Ditch Company, the principal debtor. As to these parties the debt is paid and the guaranty satisfied. The fact that the guarantor who

paid the debt took an assignment of it from the creditor does not alter the situation. This in no manner affected the liability of the debtor. Had there been no note, or had there been no assignment of the note that actually existed, its obligation would have been the same as it now is. In such a case it would still have owed the debt, and would have owed it, as it now does, to the guarantor who paid the bank, instead of owing it to the bank itself. In other words, the situation is no different than is the situation which always arises where a guarantor pays the obligation of his principal. The fact, therefore, that the guarantor took an assignment of the note instead of having it canceled, in no way affects the liability of the other guarantors to contribute.

The second reason urged is that the appellant, the present plaintiff, has no capacity, as assignee of the Pioneer Mining Company, to sue upon the obligation. This contention is founded upon § 191 of the Code (Rem.) which, omitting the proviso, reads:

“Any assignee or assignees of any judgment bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned.”

Arguing in support of the contention, counsel say that this statute “clearly and specifically requires that the obligor or debtor to be sued must be named in the assignment” before an action on an assigned obligation can be maintained by the assignee thereof. But we cannot think this the true meaning of the statute. In the first place, the purpose of the section of the

June 1920]

Opinion Per FULLERTON, J.

statute is not to confer a right of action in the assignee of a chose in action where the assignment is absolute—this is done elsewhere in the statute—but was intended to confer such right of action in those instances where the assignor retains “an interest in the thing assigned;” instances inapplicable to the situation before us. In the second place, we cannot think the interpretation which the contention puts upon the statute the correct interpretation, even conceding the statute applicable. The phrase “obligor or obligors, debtor or debtors therein named,” seems more naturally to refer to the person named in the obligation assigned, and thus not intended to require that the writing by which the obligation is assigned must name them. But the answer may be rested on broader grounds. General assignments of choses in action, even when no specific mention of the particular chose in action is made, have been recognized as valid since early territorial days, and our books are full of cases where the assignee of an obligation so assigned has been permitted to enforce it against the obligor. Legal rules and principles long acquiesced in and acted upon cannot be suddenly changed without working hardship and loss upon the business world, and such a course is not to be thought of unless some overwhelming necessity exists therefor. No such necessity exists in this instance. The statute is, at best, of doubtful applicability and of doubtful interpretation, and we think should be given an interpretation in accordance with established usage.

In this connection, it is further insisted that the assignment is of itself insufficient to pass choses in action. The concluding clause of the assignment we have quoted, is sweeping in its terms, and clearly shows an intent on the part of the assignor to sell and transfer to the assignee named in the instrument all

of its personal property of every kind whatsoever. While the cases may not be uniform on the question, it is generally held, and the better reason is, that choses in action will pass under a general description of this sort. 5 C. J. 946.

The third reason is that the action is barred by the statute of limitations. From an examination of the dates heretofore given, it will be noticed that the present action was begun more than three years, but less than six years, after the time the appellant's assignor paid to the bank the obligation of the Kugarok Mining & Ditch Company for which it had become sponsor, and the contention is that the three-year and not the six-year statute of limitations is controlling. But we think the question is controlled by our decisions in the cases of *Caldwell v. Hurley*, 41 Wash. 296, 83 Pac. 318, and *Lindblom v. Johnston*, 92 Wash. 171, 158 Pac. 972. These were actions for contribution by one surety, who had been compelled to answer for the default of the common principal, against another who was equally liable to answer for the default. In the one case the parties were sureties on the note of a third person, and in the other they were sureties upon the bond of a postmaster. In each of them the action was instituted more than three years, but less than six years, after the cause of action accrued, and in each of them the defense of the statute of limitations was imposed. In each case it was held that the statute was inapplicable, since the action was based upon an implied agreement arising out of a written instrument, and could be maintained at any time within six years after the cause of action accrued.

Counsel seek to distinguish these cases from the case at bar, but, without following the arguments, we think the governing principle is the same. If an action for

June 1920]

Opinion Per FULLERTON, J.

contribution by one indorser of a note against another indorser of the same note, or an action for contribution by one surety on the bond of a postmaster against another surety thereon, is an action upon an implied contract arising out of a written instrument, within the meaning of our statute, clearly so is an action for contribution by one guarantor of the indebtedness of a third person against his co-guarantor thereon, even though the guaranty in form be separate from the writing evidencing the debt. It is unnecessary to review the cases from other jurisdictions apparently maintaining a contrary view. In the cases cited, we pointed out the distinctions in the statutes which give rise to the differences in the holdings.

The next reason urged is that "the guaranty running to the Scandinavian American Bank is not transferable." To this it is a sufficient answer to say there was no transfer by any one of the written contract of guaranty. The facts are that, in response thereto, one of the guarantors paid the obligation and sought to assign the right of contribution arising thereby to another, and the real question is whether this right of contribution is assignable. We have no doubt that it is, and we so held in the case of *Lindblom v. Johnston*, *supra*. The principal case cited by the respondent in support of this branch of its contention, namely, *Crane Co. v. Specht*, 39 Neb. 123, 57 N. W. 1015, 42 Am. St. 562, does not, as we view it, touch the question here involved. There the defendant, in consideration that the Crane Brothers Manufacturing Company, a corporation, would sell certain materials to one Litchenberger, guaranteed payment of the purchase price of the materials. After selling certain materials to the person named, the corporation changed its name to Crane Company and thereafter sold to the same per-

son additional materials. The materials were not paid for, and the corporation, under its changed name, brought an action on the guarantee. It was held that, because of this change of name, there could be no recovery either for the materials sold prior or subsequent to the change of name; this on the principle that it was an action by one party on a guarantee given to another. The principle the court thought controlling is in itself undoubtedly sound, although, were the question necessary to be determined, we might seriously doubt its applicability to the facts presented. But, be this as it may, clearly the case does not determine that a claim for contribution is not assignable.

But perhaps the respondent means that the obligation of Metson on the guarantee was so far personal that he could not arrange with another to take up the obligation and confer on that other the right to exact from the other sureties their proportional share of the obligation when paid. If this be the point, we cannot think it tenable. The doctrine of contribution is a doctrine of equity. It is not based on contract, but is based on the principle that equality is equity, and manifestly the duty of a surety to respond when a common obligation is paid by a third person at the procurement of his co-surety is just as potent as it would be were the obligation paid by the co-surety personally. Here the co-surety surrendered his property in consideration that the person to whom it was surrendered would take up this obligation, and unless this was done under an understanding or agreement that all the sureties were to be released, the liability of the others to contribute continues. The record before us shows no such understanding or agreement.

The fifth reason assigned is that, when the appellant's assignor paid this obligation, it was but paying

June 1920]

Opinion Per FULLERTON, J.

its own debt and, because thereof, had no cause of action against any one, and hence no cause of action which it could assign to the appellant. In support of this position, counsel say:

"It is claimed in this case that the Pioneer Mining Company, assignor of the plaintiff, by virtue of a contract between it and W. H. Metson, one of the joint guarantors, became substituted for Metson as to all rights and liabilities in connection with the affairs of the Kugarok Mining & Ditch Company. Of course, this is absolutely silly. It takes at least three parties to create a contract of novation. In fact, it takes the consent of all interested in the subject-matter. No such novation as here claimed could possibly be created without the express consent and concurrence of the defendant, Davidson, and J. E. Chilberg, the other joint guarantors, and The Kugarok Mining & Ditch Company. This in reference to Kugarok affairs. A glance at the matters involved in this contract will show that it would have needed the concurrence of some ten or fifteen other persons. The agreement 'as is' that they refer to may be good as between the Pioneer Mining Company and Metson, but they cannot foist off onto the defendant any person he has not agreed to accept, nor can they vary his previous rights and liabilities, nor create new ones. This contract does not affect Davidson at all. The only bearing it has on this case is to show why the Pioneer Mining Company paid the amount of this note to the bank. And it shows very clearly. It paid it because for a valuable consideration (and that a very, very valuable one) it promised Metson so to do. It was paying its own debt and not someone else's."

This argument does not seem to us to be conclusive. The doctrine of subrogation as between the appellant and the respondent is not involved. The guarantor, Metson, contracted with the Pioneer Mining Company to satisfy an obligation on which he was jointly liable with the respondent and another. To make this con-

tract valid required no consent on the part of the other obligors, or on the part of their common creditor. As between Metson and the Pioneer Mining Company, the mining company was perhaps but paying its own debt when it paid Metson's proportionate share of the obligation, but when it paid the shares of the other obligors it did not pay either its own debt or Metson's debt, save as one person always pays his debt when he pays an entire obligation on which another is, or others are, jointly liable with him. While the payment satisfied the debt as between the guarantors and the principal creditor, it gave rise to a new right, namely, the equitable right to exact contribution from the other obligors. It is on this latter right that the action is founded, and so far from being satisfied by the payment of the principal obligation, it was created by such payment.

The sixth reason is that the question involved is *res judicata*. In his answer to the complaint, the respondent, as an affirmative defense, set out the proceedings in an action in which the respondent, J. W. Davidson, was plaintiff and J. E. Chilberg was defendant, and alleged that the subject-matter of the present action was fully adjudicated therein; further alleging:

"That the plaintiff (the present appellant) has no title or interest in or to said note and guaranty described in the complaint, but is a mere tool and dummy of the said Chilberg, and bringing this suit fraudulently for the purpose of tying up and preventing the defendant from collecting his said judgment against Chilberg by issuing and serving a writ of garnishment in this suit, and that said Chilberg is the real and beneficial plaintiff in this action; that the subject-matter of this suit is a part of the subject-matter of said suit of Davidson v. Chilberg, and the real parties in interest in both suits are the same."

June 1920] Dissenting Opinion Per HOLCOMB, C. J.

A demurrer was interposed and sustained to this branch of the answer, and the appellant asks us

“to disregard the erroneous decision of the lower court sustaining the demurrer, take as established the facts stated in said opinion (the opinion of the court rendered in the case of Davidson v. Chilberg) and to hold that this is another good reason to sustain the decision of the court below in this case.”

But this is asking us to exceed our powers. The question whether the court erroneously sustained the demurrer is not before us. This is an appeal by a plaintiff from a judgment of dismissal entered against it because it was deemed that its evidence was insufficient to make a *prima facie* case in its favor. In such a case, errors of the court committed against the other side are not reviewable. Moreover, we have quoted enough from the answer to show that it contains traversable allegations extrinsic of the judgment record, the truth of which could not be assumed even were we to hold that a defense to the plaintiff's cause of action was stated therein.

The final reason assigned requires no special consideration. It is sufficient to say that it suggests inquiries which the court cannot enter upon on this appeal.

The judgment appealed from is reversed, and the cause remanded for further proceedings.

MOUNT, TOLMAN, and BRIDGES, JJ., concur.

HOLCOMB, C. J. (dissenting)—I dissent; particularly upon the fifth contention of respondent as stated in the majority opinion.

[No. 15536. Department Two. June 8, 1920.]

In the Matter of the Guardianship of the Estate of
MARTHA E. BAYER.¹

INSANE PERSONS (4)—GUARDIANSHIP—INCOMPETENCY—EVIDENCE—SUFFICIENCY. In proceedings to discharge a guardian, findings that the ward was competent to manage her own affairs are not sustained, where it was shown that she had made and still insisted upon an improvident bargain with a brother who was dealing unfairly with her, notwithstanding it appeared that she was not insane and required no supervision over her person.

HOLCOMB, C. J., and MOUNT, J., dissent.

Appeal from an order of the superior court for Lincoln county, Sessions, J., entered May 6, 1919, discharging a guardian of an incompetent person, after a hearing before the court. Reversed.

Samuel P. Weaver (*S. H. Boyles*, of counsel), for appellant.

C. B. Willey and *Merritt, Lantry & Merritt*, for respondent.

FULLERTON, J.—In November, 1916, one John Dotson filed a petition in the superior court of Lincoln county, averring therein that Martha E. Bayer had valuable real property situated in the county named, that she was incompetent to manage her own affairs, and asked that a guardian be appointed over her estate. The application was regularly heard by the judge of the superior court, and, at the conclusion of the hearing, denied. The applicant appealed to this court from the order entered in the trial court, where the order was reversed and the cause remanded with instructions to the trial court to cause letters of guardianship to issue. *In re Bayer's Estate*, 101 Wash. 694, 172 Pac. 842.

¹Reported in 190 Pac. 323.

June 1920]

Opinion Per FULLERTON, J.

After the return of the remittitur from this court, the trial court, on July 2, 1917, appointed D. R. Cole as guardian. Cole qualified as such and has been since so acting.

This is a petition on the part of Martha E. Bayer to discharge the guardian. It was filed in the superior court on August 18, 1918. In the petition, Mrs. Bayer averred that she had fully recovered from any mental disability that might have existed at and prior to the former hearing, and was not then suffering from any mental weakness or disability whatsoever. The application was resisted on the part of the guardian, and a hearing was had in which voluminous testimony was taken. The trial court, at the conclusion of the hearing, discharged the guardian, and from the order of discharge, the guardian prosecutes the appeal.

We do not think it profitable to discuss the evidence at length. It was directed mainly to the question of the sanity of Mrs. Bayer. While it establishes, in our opinion, the fact that she is not insane in the sense that she requires confinement, or requires the supervision of a guardian over her person, we think it falls far short of establishing that she is competent to manage her property interests, or, as the statute has it, "capable of managing her own affairs." As we stated in our former opinion, Mrs. Bayer conveyed to one of her brothers the property in Lincoln county for \$3,000 in cash, a note for \$10,000, and the assumption of a mortgage which was then upon the property of \$7,000; a consideration then less than one-half the value of the land itself. It further appears that, at the time of this sale, the land had upon it a matured crop, which afterwards netted the purchaser some \$1,500 more than his cash outlay, and that he has since paid nothing on the obligations, save an inconsiderable sum, the major

portion of which was a charge for board furnished Mrs. Bayer while she was residing at his farm in the state of Nebraska. The note is unsecured and draws interest at five per centum. The real property conveyed is farm and pasture land, and yields in annual rentals more than ten times the annual interest on the note. As a business transaction, which the brother insists that it was, it was an unconscionable bargain in which the losses were all on the part of Mrs. Bayer; clearly demonstrating, as we view it, incompetency on her part to bargain in her own interests. We find nothing in the additional evidence that shows a return of capacity. She still insists that she is satisfied with her bargain, and seems to be impressed with the idea that the present proceedings are proceedings on the part of other members of her family to deprive her of the property, notwithstanding the fact that she has attempted voluntarily to part with her interests. As further evidence of her incompetency in property matters, it was shown that she owns an interest in property in another state, yet gives it no personal attention and does not know its character or value; and she testifies that, from an item she saw in a newspaper, she was led to believe that she still owned a tract of land which she had conveyed to a sister many years ago.

The trial court, in his remarks made at the time of passing upon the present application, laid stress upon the fact that the proceeding was a squabble among Mrs. Bayer's relatives, and that the interest taken in the cause by certain of her brothers, whom the court names, arises from the fact that they desire an interest in the property. It may be that the brothers who are censured will inherit from Mrs. Bayer if they survive her, and that their interests are selfish to that extent. But we think, nevertheless, that their conduct is meri-

June 1920]

Opinion Per FULLERTON, J.

torious when compared with the conduct of the brother whom the court does not name or censure. This brother has taken the property from Mrs. Bayer and has given her nothing for it save his naked promissory note. If the guardian is discharged, he has it within his power to so dispose of the property as to leave Mrs. Bayer remediless on the note, and, after so doing, can thrust her out for the remainder of her existence on the cold charities of the world. On the other hand, the action of the other brothers, if successful, will preserve the property for her use, and the property in the hands of the court will furnish her with an abundance for the remainder of her existence. Considering the question in this light, therefore, we think the comparison not unfavorable to the brothers who are seeking to preserve the property. Another matter is worthy of mention; this contest is waged solely in the interests of the brother who has the title, or, at least, he will be the sole beneficiary of the proceeding if it is successful, yet he has permitted his sister to bear the expense of the proceedings out of the fund she received from him as a cash payment on the purchase price of the property; a payment which, as we say, was returned to him, with \$1,500 in addition, shortly after he made the purchase, out of the matured crop then on the premises.

But the real issue is not what the brothers may desire. It is Mrs. Bayer's interest that is alone to be considered. If she is mentally competent to manage her own affairs, she should be permitted to do so, however much her acts in relation thereto may deprive her of her means of subsistence. If she is not so competent, the courts should interfere and protect the property for her use, however much she may will to the contrary. From the record before us, we can but think

she is incompetent, and that the court erred in discharging the guardian.

The order is reversed, and the cause remanded with instructions to deny the prayer of the petition.

TOLMAN and BRIDGES, JJ., concur.

HOLCOMB, C. J., and MOUNT, J. (dissenting)—We dissent. In our opinion, the analysis of the evidence does not by any means indicate a preponderance of the facts contrary to the findings of the trial court. Moreover, the trial court had the advantage of having all the witnesses and parties before it, and was thereby enabled to judge of their credibility in a way in which we are not. If, as the majority opinion states, Mrs. Bayer is “not insane in the sense that she requires confinement, or requires the supervision of a guardian over her person,” that certainly goes very far to justify the trial court’s findings and conclusions. The mere fact that Mrs. Bayer preferred one of her relatives to another, or that she was generous or reckless with her property, does not of itself indicate incompetency. Many persons are extravagant or over-generous, or partial to one or another of their relatives or friends, but are not, for that reason, considered incompetent to manage their affairs. If sane, Mrs. Bayer has the right to squander her property to the last dollar, if she desires.

The judgment should be affirmed.

June 1920]

Opinion Per MAIN, J.

[No. 15910. Department One. June 8, 1920.]

THE STATE OF WASHINGTON, *on the Relation of Mike Sheehan, Plaintiff*, v. W. A. REYNOLDS, *Judge etc., et al., Respondents.*¹

VENUE (18)—CHANGE—PREJUDICE OF JUDGE—RIGHT TO SECOND CHANGE—STATUTES—CONSTRUCTION. An accused having once demanded a change of venue or of judges on account of prejudice of the judge, is not entitled to seek another for prejudice of the new judge called in, under Rem. Code, § 209-2, which provides that no party or attorney shall be permitted to make more than one application.

Application filed in the supreme court May 11, 1920, for a writ of mandamus to compel the superior court for Lewis county, Back, J., to grant a change of judges. Denied.

Ralph S. Pierce, for relator.

Herman Allen and *J. H. Jahnke*, for respondents.

MAIN, J.—This is an original application in this court for a writ of mandamus. The respondents are the Honorable W. A. Reynolds, judge of the superior court of Lewis county, and the Honorable R. H. Back, judge of the superior court of Clarke county. The facts as shown by the affidavit in support of the petition for the writ which are not controverted, and the facts which are shown by the returns of the respondents to the alternative writ which are not denied, may be summarized as follows:

Elmer Smith and Mike Sheehan, together with other defendants, had been charged by information, by the prosecuting attorney of Lewis county, with the crime of murder in the first degree. On the 26th of April, 1920, Smith and Sheehan were brought before Judge

¹Reported in 190 Pac. 321.

Reynolds in order that they might enter their respective pleas to the information. While there were other defendants named in the information, only the two mentioned were brought before the court, and the case will be here treated as though they were the only parties defendants jointly charged with the crime. When they appeared before Judge Reynolds, one of the attorneys for them, then being present, informed the court that a motion for change of judge had been filed in the cause, supported by an affidavit of prejudice. Judge Reynolds thereupon declined to proceed further with the case, and requested Judge Back, of Clarke county, to come to Lewis county for the purpose of presiding in the cause. On the fourth day of May, 1920, Smith and Sheehan were brought before Judge Back, then presiding as judge of the superior court in Lewis county, for the purpose of entering their pleas to the information. Before the case proceeded and before the pleas were taken, the attorney who was present representing the defendants informed the court that a motion for change of judge, and affidavit in support thereof, had been filed. This motion was heard and denied by the court. The first motion for change of judge, or that presented to Judge Reynolds, purports to be made by both of the attorneys of record for the defendants on behalf of the "undersigned defendant." The motion is supported by affidavit of the defendant Smith. Judge Reynolds, in his return, states:

"That, at the time the request was made for change of judge, I was given to understand and led to believe that the motion for change of judge applied to both of the defendants and it was so stated to respondent, and because of the filing of the affidavit for change of judge, I had no further jurisdiction in the cause over either of the defendants, except to designate to what judge the cause would be referred. . . ."

June 1920]

Opinion Per MAIN, J.

The second motion for change of judge, or that presented to Judge Back, recites that it was made on behalf of the attorney for the defendant Sheehan, and is supported by the affidavit of the attorney signing the motion, in which affidavit it is claimed that Judge Back is prejudiced against the attorney, and for this reason the change of judge was sought.

From the facts stated, it appears that, while the first change, that from Judge Reynolds, was supported by the affidavit of one of the defendants, only the recital in the return shows that the motion for change of judge was intended to apply to both defendants. The question presented by the facts stated is whether, after there had been one change of judge on behalf of both of the defendants, upon motion supported by affidavit, that subsequently the attorney or attorneys for the defendants were entitled to a second change, upon a motion made by the attorney supported by his affidavit that the judge called in to hear the case was prejudiced against him. The question must be determined by recourse to the statute. Section 209-1 of Remington's 1915 Code provides:

"No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. . . ."

Section 209-2 is as follows:

"Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: Provided, further, that no party or attorney shall be

permitted to make more than one application in any action or proceeding under this act."

The section of the statute first quoted provides that no judge of the superior court shall sit to hear or try an action when he is prejudiced against any party or attorney, or the interests of any party or attorney appearing in the cause. In this section there is no limitation upon the time when the right given by the statute may be exercised. If the language used is given its literal meaning, the right would exist up to the time of the entry of judgment, and such a construction as is pointed out in *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40, would hamper the courts in the administration of justice to an intolerable extent.

The second section prescribes the manner in which the prejudice of the judge may be established by any party or attorney appearing therein. In this section there is likewise no limitation until the proviso is reached, where it is provided that no party or attorney shall be permitted to make more than one application in any action or proceeding under the act. It is this proviso which is to be construed in this action. Is it to be so construed that, after the parties to an action have exercised their right to a change of judge under the statute, an attorney or attorneys may exercise a similar right as to the judge called in to hear the cause? If the language in the proviso were transposed so as to read in effect that not more than one application in any action or proceeding under the act shall be made by any party or attorney, it would be reasonably plain that, after the party has exercised the right to a change, the attorney could not claim a right to a subsequent change. While the proviso is probably not aptly worded, we are inclined to the view

June 1920]

Opinion Per MAIN, J.

that the legislature intended, by the limitation there placed upon the statute, to provide that only one change could be made, and after this right had been exercised by a party to the action, that an attorney for such party did not have a right to a second.

This view is but in accord with the views expressed in decisions of this court where the statute has been construed. Soon after the statute became effective, it came before the court for construction, and the court has consistently adhered to the view of giving it a construction which will not unnecessarily impede the administration of justice. In *State ex rel. Nelson v. Yakey*, 64 Wash. 511, 117 Pac. 265, referring to the statute, it was said:

“This statute is novel and introduces a new rule of practice. Like almost all instruments designed for protection, the statute may be subject to abuse. We feel warranted, therefore, in saying that we are not disposed to give it a construction that will operate to defeat or delay the progress of a case in those counties where there is but one judge.”

In *State ex rel. Lefebvre v. Clifford*, *supra*, it was said, referring to the statute:

“If literally construed, the right would exist at any time prior to the entering of the judgment. But to place such a construction on the law is to charge the lawmaking power with an intention to cripple and handicap the courts in their attempted enforcement of the law, to an intolerable extent. Hence the necessity of construction; and construing the law and attempting to ascertain its meaning, we cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case.”

In *State ex rel. Nixon v. Superior Court*, 87 Wash. 603, 152 Pac. 1, certain creditors in a receivership pro-

ceeding petitioned the court for the removal of the receiver, and at the same time filed an affidavit of prejudice against the presiding judge. It was there held that the statute would not be construed to permit, in the collateral proceedings, persons who may be interested in the result of the litigation, when they are not actual parties thereto, to disqualify the judge by means of an affidavit of prejudice. In the course of the opinion, this language was used:

“In addition to the reasons already stated above, we are satisfied that the judge may not be disqualified to try a pending receivership proceeding to final judgment when one or a portion of the creditors interested in the receivership made an affidavit that he is disqualified in some proceeding collateral to the receivership. If this may be done by one creditor, it may be done by other creditors against another judge who may be called in, and interminable confusion would necessarily result. We are clear that it was not the intention of the legislature to permit, in collateral proceedings, persons who may be interested in the result of litigation when they are not actual parties thereto, to disqualify a judge by means of an affidavit of prejudice.”

By these decisions, and others that might be cited, it has become the settled rule that an application for change of judge under the statute must be timely and seasonably made and before the jurisdiction of the court has been submitted to.

Adhering to the view expressed in the former decisions of this court, as already stated, we think it was the intention of the legislature, by the proviso, not to permit the attorney to have a change of judge after the party to the action had once exercised the right given by the statute.

The writ will be denied.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and PARKER, JJ., concur.

June 1920]

Opinion Per MACKINTOSH, J.

[No. 15613. Department One. June 10, 1920.]

KAROLINA BEYERLE, *Appellant*, v. GEORGE BARTSCH,
Respondent.¹

WAR—ALIEN ENEMIES—TOLLING STATUTES OF LIMITATIONS—VOID MARRIAGE TO ALIEN. The contraction of a bigamous marriage with an alien enemy, void because of another wife living, does not entitle the woman to the benefit of the Trading with the Enemy Act, October 6, 1917 (U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j), and Rem. Code, § 171, excluding the duration of the war from the period limited for the commencement of actions.

HUSBAND AND WIFE (47, 48)—COMMUNITY PROPERTY—EXISTENCE OF COMMUNITY—VOID MARRIAGE. Property acquired by a woman while living with a man after a bigamous marriage is her separate property.

MARRIAGE (14-1)—VALIDITY—BIGAMOUS MARRIAGE. A bigamous marriage is absolutely void, under Rem. Code, § 7151, prohibiting marriages when either party has a wife or husband living; although Id. § 7162 defines voidable marriages and § 983 authorizes a decree of nullity where there is any doubt as to the facts.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 2, 1919, upon findings in favor of the defendant, in an action to establish a claim against the estate of a decedent, tried to the court. Affirmed.

Russell & Blinn, for appellant.

Smith, Chester & Brown, for respondent.

MACKINTOSH, J.—The appellant sues the respondent, in his official capacity as administrator with the will annexed of the estate of Frederick Stolley, deceased, for the value of services she rendered Stolley during his lifetime. On May 11, 1917, Stolley's will was admitted to probate, and on May 22, respondent was appointed administrator with the will annexed, and qualified on November 15, 1917; on the same day, an order

¹Reported in 190 Pac. 239.

was made for publishing notices to creditors, and on April 16, 1918, the appellant presented her claim, which was rejected, of which she was notified on July 22, 1918, and thereafter, on August 26, 1918, began this action.

Several defenses are presented to the action, but only one will be noticed here; that is, that the action was not begun within thirty days after the appellant received notification of the rejection of her claim. The appellant, in answer to this defense to the action, claims that she was married to Charles D. Schabel, who was a citizen of Germany, and who was taken into custody as an alien enemy March, 1918, and was still interned at the time of the trial of the action, May 26, 1919; that, during Schabel's internment, she learned that, at the time of her marriage to him, he had a wife living from whom he had not been divorced. She thereupon began an action to have her marriage annulled, which proceeded to judgment annulling the marriage. This judgment was entered two days prior to the trial of the present case. From these facts she argues that she, having been the wife of an alien enemy, was entitled to the benefit of the act of Congress, known as the "Trading with the Enemy Act," passed October 6, 1917, (U. S. Comp. St. Ann. Supp. 1919, §§ 3115¹/₂a—3115¹/₂j) and of § 171, Rem. Code, which provides that, when a person shall be an alien subject or citizen of a country at war with the United States, the time of the duration of the war shall not be a part of the period limited for the commencement of an action, and that the existence of the state of war between the United States and Germany had tolled the statute, and that she was not, therefore, bound by the statute which calls for the filing of an action upon rejected claims within thirty days after rejection; and that, although her marriage to Schabel had been annulled

June 1920]

Opinion Per MACKINTOSH, J.

prior to the trial of the present case, where an obstacle to the maintenance of an action exists at the time the action is begun and such obstacle is removed before the time of trial, it does not prevent the hearing and determination of the action.

As we view the facts of this case, the position taken by the appellant does not answer the objection raised to her suit. Her marriage with Schabel having been bigamous, she was, in the eyes of the law, never married to him, the marriage being void *ab initio*, and, therefore, not having been the wife of an alien enemy, she did not herself become an alien enemy, and whatever statutes, Federal and state, might operate in suspending litigation between citizens of this country and alien enemies, could not operate either for or against her, and the statute which provides for the beginning of actions upon rejected claims was binding upon her.

We have held that there is no community property without lawful marriage, the property acquired by a woman who has contracted marriage with a man having a wife living, during the time she was living with her purported husband, is her separate property. *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316; *In re Sloan's Estate*, 50 Wash. 86, 96 Pac. 684; *Engstrom v. Peterson*, 107 Wash. 523, 182 Pac. 623. Therefore, appellant's claim for services rendered to Stolley was her separate property, as she alleged in her complaint. Section 7151, Rem. Code, provides that marriages are prohibited "when either party thereto has a wife or husband living at the time of such marriage." Such marriages are therefore void and not merely voidable. The general law is as stated in 18 R. C. L., page 445:

"At common law and in the absence of statutory provision having a modifying effect, a civil disability,

such as having a lawful living husband or wife by a former marriage, renders a subsequent marriage absolutely void *ab initio*, in consequence of which it is good for no legal purpose, and the incidents which attend and follow on a valid marriage are not, in the absence of statute, acquired by the parties. . . . In many jurisdictions a bigamous marriage is expressly declared by legislative enactment to be illegal and void from the beginning, and the effect of such a statute is not altered by the fact that it also provides for actions to annul such marriages."

The fact that actions of annulment are taken to declare bigamous marriages void does not have the effect of making such marriages voidable, for, as stated in 18 R. C. L., page 441:

"A marriage void in its inception does not require the sentence, decree or judgment of any court to restore the parties to their original rights or to make the marriage void, but though no sentence of avoidance is absolutely necessary, yet as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction. Another reason why a judicial determination of such a marriage ought to be sanctioned is that an opportunity should be given, when the evidence is obtainable and the parties living, to have the proof of such marriage being void presented in the form of a judicial record, so that it cannot be disputed or denied. This right is granted in some jurisdictions by express statutory provision."

The statutes of this state do not expressly provide for the annulment of void marriages, but § 7162, Rem. Code, defines what marriages are voidable, and § 983, Rem. Code, provides:

"When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage."

June 1920]

Opinion Per MACKINTOSH, J.

Concluding that she was never married to Schabel, her claim was her separate property and she was bound to pursue her action upon it, after its rejection, within the time fixed by law, she not having been the wife of an alien enemy and not entitled to any extensions accorded to alien enemies by Federal or state statutes during the period of war. The lower court was right in determining that appellant's action was barred, and the judgment is affirmed.

HOLCOMB, C. J., PARKER, MITCHELL, and MAIN, JJ., concur.

[No. 15752. Department One. June 15, 1920.]

J. DI LUCK, *Respondent*, v. BRADNER COMPANY,
INCORPORATED, *et al.*, *Appellants*.¹

APPEAL (418)—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed unless against the preponderance of the evidence.

DAMAGES (73)—MEASURE OF DAMAGES—BREACH OF BUILDING CONTRACT. The measure of damages for the owner's breach in cancelling a building contract is the amount of profits which might reasonably be anticipated, being the difference between the contract price and the cost; and it is error to add anything for the contractor's loss of his time during which he sought other work.

PRINCIPAL AND AGENT (48)—AGENT'S LIABILITY—OWNER'S BREACH OF CONTRACT. Upon the owner's breach by the cancellation of a building contract, the general contractor who acted merely as agent of the owner in making the contract, is not liable.

Appeal from a judgment of the superior court for King county, Hall, J., entered April 30, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

Byers & Byers, for appellants.

MACKINTOSH, J. — Action to recover damages for breach of contract.

¹Reported in 190 Pac. 904.

On April 4, 1918, the respondent entered into a contract for the construction of terrazo floors in an apartment house in Seattle owned by the appellant Bradner Company. By the contract, it was provided that the respondent was to commence work on May 1st. On April 29, the respondent was notified that the building was ready for him to commence operations. On May 6, appellants notified respondent that his contract was cancelled. As items of damage, the respondent claimed loss of profits in the sum of \$400, and the value of the work he would have performed had he been allowed to undertake the contract, in the sum of \$238. Upon the trial, judgment was rendered in respondent's favor in the sum of \$332.85 on the first item, and \$133 on the second item.

The appellants contend that, on account of the inactivity of the respondent from April 29 until May 6, they were justified in cancelling his contract, and further claim that, in any event, the court proceeded upon a wrong basis in assessing damages. Reading over the entire record, which is short, leaves us in doubt as to the question of fact involved in this case, and as we cannot say that the evidence preponderates against the findings of the trial court, under the well recognized rule, the findings must be confirmed.

Upon the question of damages, the trial court, however, was in error. The testimony shows that the profits which might reasonably be anticipated upon the contract as awarded would amount to \$332.85, this being the difference between the contract price and what it would have cost the respondent to have performed the work called for in the contract. *Hayes v. Wagner*, 220 Ill. 256, 77 N. E. 211. The testimony also shows that, had the contract been performed, the respondent intended to work thereon and he would have been provided with thirty-four days' of work at \$7

June 1920]

Opinion Per MACKINTOSH, J.

per day, and that, during the period that respondent would have been performing the contract, he diligently sought for other work and secured it, for which he earned \$105, and the judgment allowed him the difference between \$238 and \$105, or \$133.

This second item of damages was erroneously allowed for the reason that the contract was a building contract and not a contract for services, and respondent is not entitled to double damages by treating it as both sorts of contract. When the work was done, had he completed it, he would only have received the contract amount, which would have included his own work or the work of whomever he had employed in his stead; for all the work was to be done for the price of the contract. When the appellants let the contract they were not hiring the respondent, nor was it material to them whether he labored himself or secured and paid for the labor of others.

The judgment ran against the Bradner Company, which was the owner of the premises, and E. J. Rounds, doing business as E. J. Rounds Construction Company, the general contractor who, in making the contract, acted as agent for the Bradner Company; the contract showing on its face that it was signed "The Bradner Company, Inc., by E. J. Rounds Construction Company, Agent." All the correspondence which constitutes the contract between the parties is conclusive that E. J. Rounds Construction Company was merely acting as agent of the owners; therefore, including them in the judgment was error.

The judgment of the trial court will be reduced to \$332.85 against the appellant, the Bradner Company, and affirmed for that amount.

HOLCOMB, C. J., PARKER, MITCHELL, and MAIN, JJ., concur.

[No. 15754. *En Banc*. June 22, 1920.]

THE STATE OF WASHINGTON, *on the Relation of James Allen, as Highway Commissioner, Plaintiff, v.*
THE PUBLIC SERVICE COMMISSION,
*Respondent.*¹

STATUTES (69)—GENERAL OR SPECIAL ACTS—FERRIES. The ferry law, Rem. Code, §§ 4998 to 5013-1, was a special law on that subject alone and not a general law.

FERRIES—STATUTES (45)—IMPLIED REPEAL—REGULATION OF FERRIES. The ferry law, Rem. Code, §§ 4998 to 5013-1, being a special law covering the whole subject and vesting control of ferries in the county commissioners, was not impliedly repealed by the public service commission law, Id. § 8626-1 et seq., for the regulation of public utilities by the state commission; since the last act does not cover the whole subject matter of the former one, and was not intended to take its place.

Application filed in the supreme court February 4, 1920, for a writ of mandamus to compel the public service commission to exercise jurisdiction over a certain ferry for the purpose of regulating the service and rates thereof. Denied.

M. F. Gose, for relator.

The Attorney General and R. M. Burgunder, Assistant, for respondent.

MOUNT, J.—The relator brings this action in mandamus to compel the public service commission to exercise jurisdiction over a certain ferry for the purpose of regulating the service and the rates of such ferry. The public service commission has refused to exercise jurisdiction over ferries because it is of the opinion that the exclusive jurisdiction over and control of ferries is vested in the county commissioners of the

¹Reported in 190 Pac. 1012.

June 1920]

Opinion Per MOUNT, J.

various counties of the state under the provisions of §§ 4998 to 5013-1, inclusive, Rem. Code.

The case presents but one question, namely: Did the act of 1911 (Laws of 1911, p. 538; Rem. Code, § 8626-1 *et seq.*), known as the "Public Service Commission Law," repeal by implication §§ 4998 to 5011, Rem. Code, relating to ferries? These sections will hereafter be referred to as the "ferry law."

The ferry law was originally passed in 1854 (Laws of 1854, p. 353), and, with various amendments, the last of which was made in 1915 (Laws of 1915, p. 59), constitutes §§ 4998 to 5013-1, Rem. Code. These sections make a complete law relating to ferries. This law provides that the board of county commissioners of any county in the state may grant a license to any person entitled to keep a ferry across any lake or stream within its respective county for a term not exceeding five years. It provides for an annual license fee to be paid to the county, the manner in which licenses may be granted, and the duties of the licensee. It also provides that the county commissioners may fix the rates of ferries and penalize the licensee for failure to perform the duties of ferryman. It gives to the county commissioners complete control of ferries within their counties. That control has been exercised since 1854 to the present time. In 1905 (Laws of 1905, p. 145 *et seq.*), the legislature passed an act establishing a railroad commission and giving that commission certain powers over railroads within the state. This act was amended in 1907 (Laws of 1907, pp. 275, 536 and 691); and in 1909 (Laws of 1909, p. 191) additional powers were given to the railroad commission so as to include express companies and telephone and telegraph lines. In 1911 (Laws of 1911, p. 538), the legislature passed the public service commission law, mak-

ing the former railroad commission the public service commission, giving that commission certain powers over public utilities generally, and expressly repealing the acts above referred to as the railroad commission acts. In none of these acts relating to railroads or other public service corporations is any mention made of the law relating to ferries. The relator argues that the law in relation to ferries, passed in 1854, was a general law because at that time ferries were about the only public utilities which existed in this state. It is true that many of the public utilities we now have did not then exist, but there were other public utilities, such as vessels plying upon the waters of the state, stage coaches upon the highways, and, no doubt, canals. It seems too plain for argument that the law of 1854 relating to ferries was a special law upon the subject of ferries alone. While it is true that the act of 1911, at § 8, defines the term "vessel" to include every species of water craft used in the conveyance of persons for hire, we think that term applies to vessels other than ferries licensed as such; and while the act of 1911 defines the term "public service companies" to include every common carrier, and while it is also true that a ferryman is a common carrier, we are of the opinion that it was not the intention of the legislature, in passing the act of 1911, to repeal, by implication or otherwise, the ferry law; because, in order to effect a repeal of a former act by implication, it must appear "that the subsequent statute covers the whole subject-matter of the former one and was intended to take its place." *State ex rel. Johnson v. Clausen*, 51 Wash. 548, 99 Pac. 743; *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993; *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645. At page 554, in the first case cited, we quoted from *Meade v. French*, 4 Wash. 11, 29 Pac. 833, as follows:

June 1920]

Opinion Per MOUNT, J.

“ ‘Hence the rule obtains that repeals by implication are not favored, and courts will seek to harmonize the laws and preserve them, rather than declare them abrogated or repealed; and if by any reasonable construction they can stand together, they will both be enforced;’ ”

If it had been the intention of the legislature to supersede any part of the law relating to ferries, we think it would have made that intention plain. At the time the public service commission act was pending in the legislature, three days after its passage, the legislature authorized port districts to acquire and operate ferries (Laws of 1911, p. 418); and in 1915 (Laws of 1915, p. 59; Rem. Code, § 5013-1), the legislature authorized the county commissioners of certain counties to construct and maintain interstate ferries; thus indicating that the power as defined by the ferry law over ferries was not taken away from the county commissioners. The public service commission is not given power to license ferries or to say when or where a ferry may be constructed or operated. There is no word in the public service act of 1911 regarding ferries. The power to license them is, therefore, without doubt, left to the county commissioners as provided in the ferry law. It follows, therefore; that the public service commission act does not attempt to cover the whole subject of ferries and does not take its place. Ferries are local to the counties in which they are situated, and it is reasonable to suppose that the legislature determined that the local county authorities could fix and regulate rates and service as well as the public service commission, and for that reason did not repeal, and did not intend to repeal, any part of the ferry law.

The writ is therefore denied.

MITCHELL, FULLERTON, MAIN, TOLMAN, PARKER, BRIDGES, and MACKINTOSH, JJ., concur.

HOLCOMB, C. J. (dissenting)—I dissent. This case presents solely a question of statutory construction, namely: Whether or not the provisions of §§ 4998 to 5013, Rem Code, which are referred to as the “ferry law,” have been repealed by chapter 117 of the Laws of 1911, p. 538, known as the “public service commission law.”

The contention is made that the ferry law is a special act and, therefore, is not repealed by the public service commission law, a general enactment.

In construing a law to determine whether or not it is special, that is, whether it applies to particular or whether to all persons or things of a class, it becomes necessary to deal in relative terms. No matter how restricted may appear the scope of the persons or things dealt with in a law under one set of circumstances, they perhaps constitute all of the larger class as it actually existed under changed surroundings. To determine whether the subject-matter of the law constitutes all of the class, or only individual or particular persons or things of a class, it is necessary to consider it in the light of the circumstances and conditions existing as of the time of the enactment of the statute in question. This is in conformity with the general trend of decisions by the courts on the subject.

“They [statutes] are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment.” *In re Bergeron*, 220 Mass. 472, 107 N. E. 1007.

“All will concede that in construing the Act of 1862 we are to look at the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language it did.” *Platt v. Union Pac. R. R. Co.*, 99 U. S. 48, 25 Law Ed. 424, 428.

“But courts, in construing a statute, may with propriety recur to the history of the times when it was

June 1920] Dissenting Opinion Per HOLCOMB, C. J.

passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it." *United States v. Union Pac. R. R. Co.*, 91 U. S. 72, 23 Law Ed. 224, 228.

To the same effect see *St. John's Military Academy v. Edwards*, 143 Wis. 551, 128 N. W. 113, 139 Am. St. 1123; *Bloomer v. Todd*, 3 Wash. Terr. 599, 612, 19 Pac. 135. So here, in determining whether the ferry law, passed in 1854, is a special enactment or a general one, we must bear in mind the surrounding circumstances as of the time of its enactment. At that time, it is certain that few of the public utilities now enumerated as the subjects of the public service commission law were in existence in the then territory. In fact, it becomes almost conclusive, as one ponders the thought, that men were not dependent upon public utilities throughout the territorial limits as they are today, with the exception of possibly one—ferries. Moreover, because of the lack of bridges, to the people of the territory ferries were of greater importance than they are at the present time. These are things which we may judicially notice. *McAdam v. Benson Logging & Lumbering Co.*, 57 Wash. 407, 107 Pac. 187; *Wentworth v. McDonald*, 78 Wash. 546, 139 Pac. 503. When the legislature enacted the ferry law it legislated upon almost the whole field of public utilities as then existing. Viewed in this light, I am unable to say that §§ 4998 to 5013, Rem. Code, being the ferry law, related to particular persons or things of a class within the definition of a special act. It therefore stands today as a general enactment, even though, read in the light of present-day conditions, it deals with a subject of very limited scope.

When the legislature, in 1911, enacted chapter 117, being "An act relating to public service properties and utilities, providing for the regulation of the same,

fixing penalties for the violation thereof, making appropriation and repealing certain acts," with a saving clause as to the effect of the act upon municipalities, it legislated upon the entire subject as then existing, as the territorial legislature had in 1854 when it passed the ferry law (Laws of 1854, p. 353). Moreover, by the terms defined and used in the public service commission law, it renders itself repugnant to the ferry law. It defines the term "common carrier," as used in the act, to include "all . . . steamboat companies . . . owning, operating, managing or controlling any such agency for public use in the conveyance of persons or property for hire within this state," and defines "steamboat company," as in the act employed, to include "every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, controlling, leasing, operating or managing any vessel over and upon the waters of this state." The term "vessel," when used in the act, is defined to include "*every species of water craft, by whatsoever power operated*, for the public use in the conveyance of persons or property for hire over and upon the waters within this state (excepting rowboats and sailing boats under twenty gross tons burden, open steam launches of five tons gross and under, and vessels under five gross tons propelled by gas, fluid, naphtha or electric motors)." It is manifest, by the foregoing enactments, that the intention of the legislature, when passing the public utilities act, was to embrace public carriers upon navigable waters of every kind. In modern terms, terms which we can conceive had not been popularly used at the time of enacting the earlier act, it legislated upon the same subject and by implication repealed the former act.

“As a general rule, the enactment . . . of statutes manifestly designed to embrace an entire subject of legislation, operates to repeal former acts dealing with the same subject, although there is no repealing clause to that effect. The application of the rule is not dependent on the inconsistency or repugnancy of the new legislation and the old; for the old legislation will be impliedly repealed by the new even though there is no repugnancy between them.” 25 R. C. L. 924, 925.

Chapter 117 of the Laws of 1911 manifestly is designed to embrace the entire subject of public utilities, and the intention of the legislature to repeal the former act is clearly implied.

Respondents suggest that, while three prior acts are expressly repealed in the public service commission law, the ferry law is not, and contend therefrom that it was not the intent of the legislature to repeal the latter act. The acts expressly repealed were of recent date and embraced piecemeal legislation on utilities then more prominently before the public, and I can only conclude that the failure to expressly repeal the act of 1854 was an inadvertence.

Certain sections of the old ferry act are clearly repugnant to the general public utilities law, but they can easily be eliminated and leave the ferries subject to the public utilities law as a harmonious whole.

The peremptory writ should be granted.

[No. 15802. Department One. June 22, 1920.]

CHAUNCEY W. SHELTON, *Appellant*, v. WALTER W.
POWERS *et al.*, *Respondents*.

W. W. ROBERTSON *et al.*, *Respondents*, v. CHAUNCEY W.
SHELTON, *Appellant*.¹

TRIAL (151)—FINDINGS OF FACT—NECESSITY. In a law action, under Rem. Code, § 367, it is mandatory that findings of fact and conclusions of law be made upon request.

APPEAL (145)—EXCEPTIONS TO FINDINGS—NECESSITY IN EQUITABLE ACTION. The failure to except to findings prevents inquiry as to the sufficiency of the evidence even in an equity case.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 31, 1919, upon findings of the court, in consolidated actions for cancellation of instruments and upon promissory notes. Affirmed.

W. F. Hays, for appellant.

Bronson, Robinson & Jones, for respondents.

MITCHELL, J.—These two actions were consolidated for the purpose of trial and were tried to the court without a jury, resulting in a judgment in both cases against Chauncey W. Shelton, who has appealed.

By agreement they were consolidated for the purpose of the appeal. The suit by Shelton was for the cancellation of instruments. The suit against him was upon promissory notes made and delivered by him. Formal findings of fact and conclusions of law covering both cases were signed and filed, which clearly support the judgment. No exceptions were taken to the findings of fact or conclusions of law, nor were any findings proposed by the appellant.

¹Reported in 190 Pac. 900.

June 1920]

Opinion Per MITCHELL, J.

The two first assignments of error relate to the rejection of evidence. The assignments are indefinite and appellant has not furnished any reference or citations to the pages of the statement of facts for the purpose of disclosing any prejudicial ruling in the rejection of evidence. While under the case of *Morrissey v. Schultz*, 68 Wash. 237, 122 Pac. 1065, we are not called upon to search the record in this respect, we have, however, because of its being a small record, examined it with care and fail to find any support for the claim of errors.

The other assignments are that the court erred in its findings, conclusions and judgment. Indeed, this is the only assignment argued either orally or in the brief. As to the action against the appellant, it being a law action, the statute (§ 367, Rem. Code) is mandatory that findings of fact and conclusions of law shall be made upon request, as was done in this case at the instance of respondents. *Western Dry Goods Co. v. Hamilton*, 86 Wash. 478, 150 Pac. 1171; *Wilson v. Aberdeen*, 25 Wash. 614, 66 Pac. 95. The failure to except to the findings prevents us from inquiring into the sufficiency of the evidence to sustain them. *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717; *Nichols v. Capen*, 79 Wash. 120, 139 Pac. 868.

As to the action by appellant, it is true it is an equity case wherein it was not necessary for the trial court to make findings of fact, but "we have repeatedly held that, where findings of fact are made in an equity case, exception must be taken to such findings in order to secure a review of the trial court's conclusions reached therein." *Ready v. McGillivray*, 109 Wash. 387, 186 Pac. 902.

Affirmed as to both cases.

HOLCOMB, C. J., PARKER, MAIN, and MACKINTOSH, JJ.,
concur.

[No. 15558. *En Banc*. June 22, 1920.]

E. D. CUDDY (*Vera M. Cuddy substituted*), Respondent,
v. C. K. STURTEVANT *et al.*, Appellants, THE
CITY OF CENTRALIA *et al.*, Defendants.¹

USURY (13)—EQUITY (39)—RELIEF—CONDITION PRECEDENT. A party seeking equitable relief from an usurious contract must at least offer to return what he has received.

USURY (3)—MUNICIPAL BONDS—STATUTES. Municipal bonds sold at a discount which would result in greater interest than six per cent, in violation of Rem. Code, § 8008, are not therefore usurious; since the usuary statute, *id.* §§ 6250-6256, permits eight per cent interest on such bonds, and fixes penalties only in case of interest exceeding that "hereinbefore" provided for.

MUNICIPAL CORPORATIONS (525)—BONDS—SALE AT DISCOUNT. The sale of municipal bonds at a discount resulting in greater interest than allowed by law is an irregularity merely, and does not effect the power to make and issue the bonds.

SAME (525)—BONDS—SALE AT DISCOUNT—RECITALS—ESTOPPEL—RIGHTS OF BONA FIDE PURCHASERS. Recitals in municipal bonds, payable to bearer out of a special fund, that every condition precedent to their issuance has been performed, work an estoppel in favor of bona fide purchasers in the open market, who are not required to consult the records to determine whether they were originally sold at a discount resulting in a greater rate of interest than allowed by law.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered June 16, 1919, adjudging the validity of certain municipal water bonds, in an action for an injunction. Reversed.

Preston, Thorgrimson & Turner and *Peters & Powell*, for appellants.

C. D. Cunningham and *Dysart & Ellsbury*, for respondent Cuddy.

H. O. Grimm and *P. M. Troy*, for respondents City of Centralia *et al.*

¹Reported in 190 Pac. 909.

June 1920]

Opinion Per MAIN, J.

MAIN, J.—This action was brought by a taxpayer for the purpose of having certain municipal water bonds declared illegal and void. The defendants were the city of Centralia and its officers, the original purchaser of the bonds, and two of the present bondholders. From the judgment entered by the superior court holding that the bonds were not void, but applying the penalty provisions of the usury statute thereto, the two bondholders appeal. Carstens & Earles, Incorporated, was dismissed out of the action, apparently on the ground that the statute of limitations had run against any right of this corporation, and all parties seemed to have acquiesced in that ruling. The essential facts to be stated are not in substantial dispute.

On December 10, 1912, the voters of the city of Centralia authorized the city officers to acquire a water system and to issue bonds therefor in the sum of \$300,000, bearing interest at the rate of not to exceed six per cent per annum. The election was called and held pursuant to Ordinance No. 281 of the city. After the proposition had been approved by the voters, the city advertised for bids for the sale of the bonds; and on March 18, 1913, the entire issue was sold to Carstens & Earles, a corporation, for the sum of \$287,326 and accrued interest. After the bonds had been delivered to Carstens & Earles, they were sold by that corporation to various purchasers. As above stated, two of such purchasers are parties to this action; C. K. Sturtevant, of Seattle, was the owner of bond No. 259, and Samuel P. Strang, of Portland, Oregon, was the owner of bonds Nos. 587 and 588. In all, six hundred bonds were issued by the city, each in the sum of \$500, and each carrying coupons evidencing the semi-annual interest due thereon. From the time the bonds were delivered until the institution of this action, which was on the 16th of October, 1918, the

city had regularly paid the semi-annual interest coupons as they became due. On the back of each of the bonds is printed chapter 150 of the Laws of 1909, which is an act giving power to cities and towns to acquire and operate certain public utilities, and providing for the modes of payment therefor. There was also printed on the back of each of the bonds Ordinance No. 281, which submitted the matter of acquiring a water system to the voters of the city, and also Ordinance No. 302, which provided for the issuance of \$300,000 of special water bonds in accordance with the proposition submitted by Ordinance No. 281. Ordinance 302 provides that bonds 1 to 12, inclusive, shall be payable on May 1, 1919, bonds 13 to 26, on May 1, 1920, and a certain number of bonds shall be payable on May 1 each year thereafter until May 1, 1938, when bonds Nos. 551 to 600 shall become payable. The ordinance sets out an exact copy of the bond to be issued. In the bond there is a recital as follows:

“It is hereby found and declared, that said bonds are issued pursuant to and in strict compliance with chapter 150 of the Laws of 1909 of the state of Washington, and of the ordinances of said city of Centralia, referred to in this bond and printed hereon, and that all acts, things, elections, ordinances, resolutions, and conditions precedent, precedent to the right to issue and deliver this bond, as prescribed by said statute and ordinances, have happened, existed, and been done and performed prior to the issuance hereof.”

The bonds bore interest at the rate of six per cent per annum. The total issue of the face value of \$300,000, as above stated, was sold to Carstens & Earles for the sum of \$287,326. The taxpayer claims that, since the bonds were sold at a discount, which would cause the payment of interest upon the amount of money the city received to be at a rate greater than six per cent per annum, they are void, and asks to have

June 1920]

Opinion Per MAIN, J.

their payment enjoined. Under § 8008 of Remington's Code, which is one of the sections of the act under which the bonds were issued, the city was not authorized to sell the bonds at a discount which would result in the payment of interest at the rate of more than six per cent per annum upon the money received therefor by the city. Sturtevant and Strang, the appellants, contend that, by reason of the recital in the bonds, the city is now estopped to question their validity in the hands of purchasers who acquired them for value and without knowledge or notice that they had been sold at a discount not authorized by law.

The trial court adopted neither of these contentions, but entered a judgment in favor of Sturtevant and Strang, after applying to each bond the penalty of the provision of the usury statute. The bonds were not due at the time of the trial and are not yet due, and neither of the bondholders asks for a judgment thereon. The prayer in their answer was for a dismissal of the action.

In applying the usury statute to the bonds in question, we think the trial court was in error. The rate of interest which the city was required to pay by reason of the fact that the bonds were sold at a discount, while greater than six per cent, did not equal eight per cent. This was an action in equity, and one of the equitable doctrines is that a party coming into equity must offer to do equity. In applying this doctrine, the courts, so far as we are advised, have uniformly held that a party seeking to be relieved from an usurious contract must at least offer to return what he has received under the contract. There is no such offer in this case. There is another reason why the usury statute is not applicable to the bonds. The bonds, as already stated, were issued payable out of a special fund, as authorized by § 8008 of Remington's 1915

Code. In this section there is a provision that bonds issued thereunder shall bear interest "not exceeding six per cent per annum." Neither the section nor the act of which it is a part makes any provision for a penalty when bonds have been sold so that the rate of interest which the city would be required to pay is greater than six per cent. In 1899, the legislature passed a law establishing the legal rate of interest and fixed the penalty when a greater rate of interest than that there specified was contracted for. Laws of 1899, chapter 80, p. 128. This law is codified in Remington's 1915 Code in §§ 6250 to 6256, inclusive, and has not, subsequent to its passage, been amended. Section 4 of the act is as follows:

"All county, city, town and school warrants, and all warrants or other evidences of indebtedness, drawn upon or payable from any public funds, shall bear interest at a rate not greater than eight per centum per annum, unless a less rate be specified therein."

Section 7 of the act provides that, if a greater rate of interest than is "hereinbefore" allowed shall be contracted for, the contract shall not be void. The section also fixes the penalties which may be visited upon a party to an usurious contract when an action is brought thereon. Under this section the penalties refer to cases where the rate of interest has exceeded that "hereinbefore" provided for. As applied to city bonds, under § 4, the penalty could not be invoked unless such bonds bore interest at a rate greater than eight per cent per annum. Section 7 does not provide that, if any rate of interest be exacted greater than that allowed by law, the penalty provisions of the act shall be applicable. While the bonds in the present case were sold at a rate greater than that allowed by the act under which they were issued, they are not

June 1920]

Opinion Per MAIN, J.

subject to the penalty provisions of the usury statute because the section providing for such penalties refers only to a greater rate of interest than is "hereinbefore" provided for. In support of the position that the penalty provision of the usury statute should be applied to these bonds, the cases of *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, and *Spear v. Bremerton*, 90 Wash. 507, 156 Pac. 825, are cited. In neither of those cases was the court construing the usury statute. There is language in them, especially in the former, which refers to a rate of interest greater than that allowed under § 8008 as usurious, but the language was used as describing a rate of interest greater than that allowed by the law under which the bonds were proposed to be issued, and had no reference to the question whether the penalty provision of the usury statute proper was applicable. The question of usury, however, in this case is largely incidental and is not one of the primary questions about which the controversy is waged. The bonds here involved, in the hands of parties who had purchased them for value with no knowledge of any infirmity therein, are either valid or void.

Upon this branch of the case, the two questions which seem to us controlling are, first: Does the doctrine of estoppel by recitals apply to these bonds; and second, if it does, were the purchasers, Sturtevant and Strang, required to examine the records of the city of Centralia for the purpose of ascertaining at what price the bonds were sold to Carstens & Earles? In considering these questions, it must be remembered that it is not the original purchaser that is here involved, but those that acquired the bonds in the open market from, or after they had been sold by, the original purchaser, and who took them without knowledge or notice that they were sold at a discount not authorized by

law. The question as to when the doctrine of estoppel by recitals in the bonds will prevent a municipality from raising certain defenses after the bonds have passed into the hands of a *bona fide* holder for value has frequently been before the United States supreme court. In fact, most of the adjudications are from that tribunal, the question having generally arisen between the municipal corporation issuing the bonds and a nonresident holder.

In Dillon on Municipal Corporations it is said the decisions of the United States supreme court on the question are practically controlling. After reviewing certain decisions of that court, the author, in vol. 2 (5th ed.), § 914, states the rule to be as follows:

“The cases referred to in the last two sections afford, perhaps, a more striking illustration than any previously decided by that court, that the *purchaser may implicitly rely upon the recitals in the bonds*, made by the proper officers, that the authority to issue them has arisen, and that he is under no obligation, unless the statute so prescribes, to consult the records of the municipality, and is not charged with constructive notice of their contents; and this, too, it will be observed, where the recital in the bonds was general and not specific in its nature, and where the facts which would have shown the issue of the bonds to have been illegal were matters appearing upon the public records of the township.”

In *Sutliff v. Lake County Commissioners*, 147 U. S. 230, the court had before it an issue of bonds by Lake county, in the state of Colorado. In that state the amount of debt which a county could incur was limited by the constitution and by statute. The statute required the county commissioners to publish and enter upon the public records of the county semi-annual statements showing the whole amount of the county debt. The bonds issued were in excess of the debt

June 1920]

Opinion Per MAIN, J.

limit fixed by the constitution and statute. The bonds contained a recital that all of the provisions of the act under which they had been issued had been fully complied with by the proper officers. There was no specific recital that, in issuing the bonds, the constitutional debt limit of the county had not been exceeded. It was there held that the recital in the bonds that all of the provisions in the statutes had been complied with did not estop the county from defending against the bonds on the ground that they were issued in violation of the constitution.

In *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, bonds issued by Gunnison county, Colorado, were involved. The county defended on the ground that it had no right to issue the bonds because in so doing it had exceeded the debt limit fixed by the statute and the constitution of the state. In the bonds there involved there was a recital that their issue did "not exceed the limit prescribed by the constitution of the state of Colorado." It was held that this specific recital that the constitutional debt limit had not been exceeded by the issuance of the bonds estopped the county from defending on that ground. In that case the previous decisions of that court upon the question were considered, reviewed and distinguished. The same statute and constitutional provision was involved as in the *Sutliff* case.

The rule stated in *Dillon on Municipal Corporations*, above quoted, as well as the decision in each of the cases just referred to, has reference to applying the doctrine of estoppel to municipal bonds which are negotiable under the law merchant or the negotiable instrument act. The taxpayer in this case argues that the doctrine should not be here applied because the bonds involved are not negotiable in the full sense, for the reason that they are payable out of a particular

fund, to wit, the revenue from the water system. Under § 3394 of Remington & Ballinger's Code, an order or promise to pay only out of "a particular fund is not unconditional," and such a bond is therefore not a negotiable instrument as defined in that act. Admitting that the bonds here in question are not negotiable instruments under the law merchant or the negotiable instrument act, the question arises whether the doctrine of estoppel by recital should be applied to bonds such as these. On their faces the bonds are made payable to "bearer," and therefore passed from hand to hand by delivery. The statute under which they are issued provides that the holder thereof shall have a valid claim against the special fund created for their payment, and that the holder may bring an action thereon against the city issuing them.

While the adjudicated cases deal largely with bonds negotiable in the full sense, it is not the fact of negotiability that causes the estoppel, but the recitals. Even negotiable bonds, if issued by a municipality without power, are not subject to the doctrine of estoppel by recitals when the bonds are in the hands of a *bona fide* holder. The estoppel operates upon the irregularity in the issuance of bonds, and not upon the power of the municipality to issue them. A sale of bonds by a municipal corporation at a price which will require the payment of a greater rate of interest than that provided by statute is a mere irregularity and does not affect the power of the municipality to make and issue the bonds.

In Dillon on Municipal Corporations (5th ed.), vol. 2, page 1401, it is said:

"A sale of the bonds at less than par, contrary to the statutory direction, does not affect the fundamental power of the municipality to make and issue the bonds; it is a mere irregularity in the exercise of its powers,

June 1920]

Opinion Per MAIN, J.

and the validity of the bonds is not affected thereby in the hands of innocent purchasers for value."

In *County of Clay v. Society for Savings*, 104 U. S. 579, two classes of bonds were involved, one negotiable and the other not negotiable because payable upon a condition. The doctrine of estoppel was there applied to both classes of bonds, but the question as to whether it should be applied in one case and not the other was not suggested or discussed in the opinion. The holding cannot, therefore, be considered an authority for applying the doctrine to nonnegotiable bonds. As relating to individuals, the doctrine of estoppel by recitals has been applied to instruments not negotiable in the full sense. *Weyh v. Boylan*, 85 N. Y. 394; *Musselman v. McElhenny*, 23 Ind. 4. Where the question is one between individuals, it appears that the estoppel operates, even though the bonds are not negotiable in the full sense.

This court has announced the doctrine that the same rule or standard which measures the rights and liabilities of individuals should be applied to the business contracts of municipal or public corporations. Since it is not the negotiability that works the estoppel, but the recitals, it seems to us that the doctrine should be applied to the bonds in this case. When it becomes a question between an innocent purchaser of bonds in the open market and the city purporting to issue them, as to which should be the loser by a breach of duty on the part of the city officers, such question should be solved in favor of the innocent purchasers. *Schmidt v. City of Defiance*, 117 Fed. 702. The bonds in question have all the characteristics of negotiability, except that they are made payable out of a particular fund.

It is true that in *Ruling Case Law*, vol. 19, page 1014, the rule is stated to be that the doctrine of estoppel

by recitals does not apply to nonnegotiable municipal bonds. In support of this statement there is cited *Gunnison County Commissioners v. Rollins*, 173 U. S. 255; *Goose River Bank v. Willow Lake School Township*, 1 N. D. 26, 44 N. W. 1002. In the case first cited, the question was not involved or discussed. In the North Dakota case, the question did not involve bonds, but warrants. There a teacher had been employed who did not hold a lawful certificate, and, under the express terms of the statute, her contract was void. That case cannot be regarded as controlling.

In *Washington County v. Williams*, 111 Fed. 801, there is a statement that the purchaser in the open market of nonnegotiable bonds of a municipal corporation cannot invoke for his protection the doctrine of estoppel by recitals. Not only was the question not necessarily involved in that case, but the court there was considering a case where it was claimed that the bonds had been issued without power. If issued without power, as above stated, it is the general rule that the doctrine does not apply.

This brings us to the second question, which is whether the purchasers in the open market, for value and without knowledge or notice of any infirmity in the bonds, were required to examine in the city records the contract made with Carstens & Earles and determine whether the bonds were sold so that a greater rate of interest would be paid than that allowed by law. The bonds, as above stated, contain a copy of the act of the legislature which authorized their issuance, a copy of the ordinance submitting the question to the voters of the city, and a copy of the ordinance providing for the issuance and sale of the bonds. This last ordinance recites that the bonds had been sold to Carstens & Earles and that a contract for such

June 1920]

Opinion Per MAIN, J.

sale had been entered into. The bonds on their faces recite that,

“All acts, things, elections, ordinances, resolutions and conditions precedent to the right to issue and deliver this bond, as prescribed by said statute and said ordinances, have happened, existed and been performed prior to the issuance hereof.”

This is a specific recital that every condition precedent to the issuance of the bonds had been performed, and under the rule stated by Judge Dillon, was sufficient to work an estoppel, and the purchasers in the open market were not required to look into the records of the city and examine the details of the contract which had been made with Carstens & Earles.

The statute under which the bonds were issued, § 8008, Remington's Code, authorizes the officers of the city, upon the conditions there specified, to issue and sell bonds. It is further provided that such bonds “shall be sold in such manner as the corporate authorities shall deem for the best interest of the city.” Here was general authority to the officers of the city to determine whether the conditions precedent necessary to the issuance of the bonds had been performed. Specific authority to that effect was not required, since full control of the matter was given to the corporate authorities. McQuillin on Municipal Corporations, vol. 5, p. 4891. Section 7642 of Remington & Ballinger's Code, which is one of the sections under the general title of Municipal Corporations, requires that all orders of a city council shall be entered upon the journal of its proceedings. The fact that the price at which the bonds had been sold could have been discovered by examining the records of the city council will not prevent a *bona fide* purchaser from relying upon the doctrine of estoppel.

In *McQuillin on Municipal Corporations*, vol. 5, § 2335, it is said:

“Recitals in municipal bonds are binding notwithstanding that they are contrary to matters appearing of public record. This is the rule in force at present.”

In *Waite v. Santa Cruz*, 184 U. S. 302, municipal bonds had been issued which contained the recital that all “acts, conditions and things required by law at which time precedent to and in the issuance of said bonds had been properly done, happened and performed in legal and due form, as required by law.” The bonds in that case referred to a certain ordinance of a municipality. If the ordinance had been examined by the purchasers of the bonds, it would have disclosed a portion of them invalid. The court there applied the doctrine of estoppel and used this language:

“The City of Santa Cruz had power, under the constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the constitution of the state. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds, that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances

June 1920]

Opinion Per MAIN, J.

of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds."

The case of *Presidio County v. Noel-Young Bond & Stock Co.*, 212 U. S. 58, is to the same effect. There is nothing on the face of the bonds involved in the present action that indicates that the recitals therein are untrue. The city council had general authority to determine whether the conditions precedent had been performed. The defects in the bonds constituted a matter peculiarly within the knowledge of the corporate authorities. The fact that the statute under which the bonds were issued and the two ordinances were printed in full upon the backs of the bonds would indicate that the city council intended thereby to convey to the purchaser in the open market that he would thereby get all the information which was necessary for him to have to determine the validity of the bonds.

The judgment will be reversed, and the cause remanded with directions to the superior court to dismiss the action.

ALL CONCUR.

[No. 15743. Department Two. June 23, 1920.]

*In the Matter of the Estate of MIKE FICK.*¹

EXECUTORS AND ADMINISTRATORS (62)—ALLOWANCE TO WIFE—VACATION OF ORDER—FRAUD—EVIDENCE—SUFFICIENCY. An order setting aside real estate to a widow under Laws of 1917, p. 607, § 103, is properly vacated for fraud, where it was obtained by false statements as to its value and lack of personal property, and without any notice to minor heirs.

SAME (26)—REMOVAL—GROUNDS—FRAUD OF ADMINISTRATRIX. An order removing deceased's widow as administratrix of the estate is warranted where she represented that there was no personal property and failed to account for personal property and money of the value of \$2,888.

Appeal from an order of the superior court for Pierce county, Card, J., entered June 16, 1919, removing an administratrix of an estate and vacating an order awarding property to the widow of the deceased, after a hearing before the court. Affirmed.

Louis J. Muscek and Blackburn & Gielens, for appellant.

H. G. Rowland and Dix H. Rowland, for respondents.

MOUNT, J.—This proceeding was brought to remove the administratrix of the estate of Mike Fick, deceased, on the alleged ground that she had misappropriated the property belonging to the estate, neglected her trust, and was attempting to secure for herself all the property of the estate; and, also, for the purpose of setting aside an order awarding to the administratrix, as widow of the deceased, fifty acres of land, on the ground that said order was obtained by fraud. The petition was filed by a minor child of the deceased through his guardian *ad litem*. Upon issues joined, the case was tried to the court, and, at the conclusion

¹Reported in 190 Pac. 1008.

June 1920]

Opinion Per MOUNT, J.

of the evidence, the trial court discharged the administratrix and set aside the order allowing to the widow fifty acres of land. The administratrix has appealed from that order.

The facts are substantially as follows: Mike Fick died intestate in Pierce county in August of 1916. At the time of his death, he owned a fifty-acre tract of land, on which was located his dwelling and farm buildings. This fifty-acre tract was subject to a mortgage of \$1,000. He also had contracted to buy from one Swanson forty acres additional which adjoined the fifty acres, for the sum of \$2,000. There was still due on this contract \$400 at the time of Mr. Fick's death. He also left personal property of the value of something over \$1,500, as found by the trial court. He left a widow and nine children, four of whom were minors. The others were married and doing for themselves.

About nine months after the death of Mike Fick, his widow, who had married one Steve Lindway in the meantime, petitioned for letters of administration upon the estate of her deceased husband. She was, in due time, appointed administratrix, qualified and gave bond, and letters of administration were issued to her. She thereupon made an inventory, describing the real estate above referred to and alleging that there was no personal property belonging to the estate. Appraisers were appointed; the fifty-acre tract was appraised at \$2,910; the forty-acre tract was appraised at \$2,000; another small tract at \$100. After the inventory and appraisals were made, the widow petitioned the court to set aside to her the fifty-acre tract. A notice was posted, directing all persons to appear and show cause, if any, why the court should not award to Mary Fick Lindway a homestead in accordance with ch. 156, § 103 of the Laws of 1917, describing the property. No guardian *ad litem* was appointed to

represent the minor heirs and they were not represented at the hearing. At that hearing, no evidence was introduced as to the value of the property, except the appraisalment which had theretofore been made. The court thereupon set over the fifty acres to the widow.

Thereafter a petition in this proceeding was filed, alleging in substance that the administratrix had neglected her trust, had misappropriated the personal property belonging to the estate, and was attempting to secure for herself all the property of the estate, and that the setting aside of the fifty acres to the administratrix was procured by fraud upon the court, because it was not shown what the value of the property was at that time. It is alleged in the petition that the value of the property at that time was largely in excess of \$3,000, and that this fact was known to the administratrix.

The appellant makes a number of assignments of error, but these are discussed upon two points, as follows: First, that the court should not have set aside the order and judgment awarding the tract in question to the appellant as a homestead; and second, that the court was not justified in discharging appellant as administratrix of her husband's estate, and refusing to allow her commissions and holding her liable for the personal property collected by her.

Upon the first question, the respondent argues that the order here made was not the awarding of a homestead, but was an order made under § 103 of the act of 1917 (Laws of 1917, p. 670). It is argued that, because Mike Fick died in August of 1916, prior to the time the act of 1917 took effect, the estate is governed by the prior law, and therefore the order setting aside this fifty-acre tract was void in any event.

. It is not necessary to decide or to discuss this ques-

June 1920]

Opinion Per MOUNT, J.

tion, because we are satisfied that, even if the act of 1917 applies, there is ample evidence of fraud to justify the court in vacating the order. It is not disputed that, at the time of the death of Mike Fick, the property was all community property and that he left, at the time of his death, personal property of the value of about \$1,500. The widow, at the time of her appointment as administratrix, alleged that there was no personal property. When she applied to the court for an order setting aside to her this tract of land as a homestead, no proof was offered as to the value of the tract of land at that time. While there is a dispute in the evidence as to its value, the trial court found as a fact that it was worth at that time at least \$5,000. The minor heirs were not represented at the hearing. At the time the order was made, none of the children resided with their mother. She had remarried Mr. Lindway and was living upon the property.

In view of these facts, and especially in view of the fact that the minors were not represented by a guardian *ad litem*, and in view of the fact that the property set over exceeded in value the sum of \$3,000, and this fact was known to the appellant, we think it follows as a matter of course that the trial court was justified in setting aside that order.

We are also satisfied that the trial court was justified in removing the appellant as administratrix. The deceased, at the time of his death, left upon the farm \$1,533.30 worth of personal property. The administratrix had represented to the court that there was no personal property. After her appointment she had rented the farm without accounting therefor, for sums aggregating \$1,350, as found by the court; she had collected an insurance upon a burned building, \$300; she had borrowed upon the forty-acre tract

some \$600, making a total of \$3,783.30. The court found that she accounted for, and was entitled to, a credit of \$894.64, leaving a balance of \$2,888.66 to be accounted for by her. We think it is plain from these findings, which are amply supported by the evidence, that the administratrix was at least neglectful of her trust, even if she was not attempting to convert to her own use all the property of the estate without considering the interest of her children.

Upon the whole record, we are satisfied with the disposition of the case made by the trial court, and the judgment is therefore affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15884. Department Two. June 23, 1920.]

EDWIN FULLER NUDD *et al.*, *Appellants*, v.

OWEN A. ROWE *et al.*, *Respondents*.¹

JOINT ADVENTURES—ACCOUNTING—CONTRACT—PERFORMANCE OR BREACH. An action for an accounting and to quiet title to land should be dismissed as unsustained, where plaintiffs and defendant had entered into an agreement whereby defendant advanced the money to redeem the land from foreclosure and liens, taking a mortgage and deed, the parties agreeing that defendant should have absolute control of its platting and sale, and, after all expenses were paid, sixty per cent of the net profits, and it appeared that defendant had not failed in any duty and that it had as yet been impossible to sell the land so as to obtain return of the money or any profits.

Cross-appeals from a judgment of the superior court for Lewis county, Reynolds, J., entered February 19, 1920, upon findings favorable to the defendants, dismissing an action for equitable relief, tried to the court. **Affirmed.**

¹Reported in 190 Pac. 902.

June 1920]

Opinion Per TOLMAN, J.

W. F. Hays, for appellants.

John P. Gallagher and *Edward Judd*, for respondents.

TOLMAN, J.—In February, 1917, the appellant Edwin Fuller Nudd was the owner of a tract of land, consisting of approximately 4.19 acres, situated near the business center of the city of Centralia, but one block from the main street of the city, wholly unimproved except for an old frame warehouse building and certain fruit trees which were situated thereon. A mortgage for a considerable amount upon this property had been foreclosed, a number of judgments had been rendered against appellant which were liens thereon, and appellant's equity of redemption in the land was about to be lost by reason of the expiration of the statutory redemption period. The land was also subject to taxes and assessments, delinquent and unpaid, the whole of the encumbrances at that time aggregating approximately \$15,000. For the purpose of saving something out of the property, the appellant sought to obtain a loan in an amount sufficient to pay off the liens against the property, which would enable him to make redemption and retain the title subject only to the lien of such new loan. After considerable unsuccessful effort, appellant was led, by reading an advertisement, to go to respondent Owen A. Rowe, and succeeded in interesting him so that the parties entered into the following arrangement: Appellant made an application to respondent for a loan of \$15,000, to be secured by mortgage, in which application he agreed to pay a commission of \$1,000 for obtaining the loan. He, together with his wife, executed twelve notes for \$1,000 each, and six notes for \$500 each, all bearing date March 10, 1917, and executed a mortgage on the same date upon the property, which, by its terms, secured

the payment of the eighteen notes referred to, all of which bore interest at the rate of seven per cent per annum, payable semi-annually, and matured in five years after date. Thereupon, and as a part of the same transaction, the appellant and his wife, by a deed, conveyed the property to respondent Owen A. Rowe, subject only to the \$15,000 mortgage just mentioned, and the parties entered into the following agreement in writing:

"In consideration of Edwin Fuller Nudd and Jennie Nudd, his wife, conveying to Owen A. Rowe this day a certain tract containing 4.19 acres of land, situated in Centralia, Lewis county, Washington:

"It is understood and agreed by and between the parties signing this agreement, that Owen A. Rowe is to have absolute control of and is to use his best endeavors in the management and sale of said land, leaving it optional with him as to platting into lots and disposition of same; that all expenses incurred in taking care of the principal and interest on one certain mortgage of fifteen thousand (\$15,000) dollars, this day executed by said Edwin Fuller Nudd and Jennie Nudd, his wife, to said Owen A. Rowe, together with taxes, assessments and all other expenses incidental to the platting of said property and sale of the same, allowing a reasonable amount for advertising said property, and commission on sale of said property shall be first deducted from the proceeds of the moneys received from sale or sales therefrom, after which the net proceeds shall be divided at the rate of forty per cent (40%) to Edwin Fuller Nudd and Jennie Nudd, his wife, and sixty per cent (60%) to Owen A. Rowe.

"In other words, all expenses and charges against said property and all expenses incurred and to be incurred in connection with the handling and disposing of same to be first paid, and thereafter the net proceeds to be divided as above stated. Dated this 10th day of March, 1917.

Edwin Fuller Nudd,

"Jennie Nudd,

"Owen A. Rowe."

Respondent caused the mortgage and deed to be duly recorded and, immediately upon the closing of the transaction, proceeded to Centralia, and on March 12, 1917, paid out in redemption from the judgment sale of the property \$3,100.92, and in satisfaction of certain judgments which were liens, \$266.82, \$86.20, and \$23.10. Thereafter, on July 12, 1917, respondent paid to redeem from the mortgage foreclosure \$10,480.22, and on May 31, 1918, paid in satisfaction of a special assessment which was a lien upon the property \$718.55. General taxes which were then a lien were not paid, and, at the time of the trial below, evidence was introduced showing that the 1916 general taxes amounting to \$386, the 1917 taxes amounting to \$408, and the 1918 taxes amounting to \$443, with interest on each, were delinquent and unpaid, as well as a local improvement assessment for \$232.35. Appellants, in their complaint, in addition to alleging the foregoing facts, allege that the respondent represented that he was possessed of ample means of his own to take up and discharge all of the liens against said lands, would do so within a reasonable time, and that he would plat the property into lots, advertise the same for sale, and thus realize for appellants upon their interest in the property. They further allege a total failure to plat or sell; that respondent is misrepresenting the value of the property in order to prevent a sale and to defeat the purpose of the agreement heretofore set forth, and they pray for an accounting and for the cancellation of the warranty deed, mortgage and promissory notes, that title to the property be quieted in them, and for general relief.

By way of an answer and cross-complaint, respondents, after appropriate denials of all allegations of misconduct, allege that the transactions hereinbefore referred to created a partnership, and pray for an ac-

counting, that the partnership be dissolved, the real estate sold under order of the court, the proceeds devoted to the payment of the indebtedness of the partnership, and any surplus be divided in proportion of forty per cent to the appellants and sixty per cent to the respondents. From that part of the judgment dismissing the complaint and the cause of action therein set forth, without costs, appellants appeal, and likewise from that part of the judgment dismissing the cross-complaint and the cause of action therein set forth, without costs, the respondents appeal.

In addition to the facts hereinbefore set forth, it appears from a careful examination of the record that the respondent has, since the execution of the notes and mortgage referred to, sold the notes to his customers, none of whom are parties hereto, and has, since negotiating the notes, paid five semi-annual interest payments thereon, each aggregating the sum of \$525, so as to keep the notes in good standing and prevent a default. He has likewise received some small amounts from renting the property for circus and exhibition grounds, paid out some small items for advertising and the like, in addition to those hereinbefore mentioned, and submits an account of which the first item is \$1,000 commission for obtaining the loan, which, whether this item be considered or not, shows that he has paid out more money on account of the property than he has received from the sale of the mortgage notes and rentals. At the trial, it was attempted to be shown that respondent had disposed of the building on the property for a matter of \$9 or \$10, when it was really worth \$800 or \$900, and caused or permitted twenty-six fruit trees to be cut down and removed from the land, which one witness says were, or might have been, worth \$100 per tree. In view of the terms of the contract, which gives to respondent

June 1920]

Opinion Per TOLMAN, J.

absolute control of the property, it is sufficient to say that, from the evidence as a whole, it does not appear that respondent acted in bad faith in disposing of the building and in permitting the cutting down of the trees. If he erred therein it was an error of judgment, and even that will not appear until the property is sold. So, manifestly, he cannot now be held accountable therefor. The evidence entirely fails to show that there has ever been a time since the inception of this transaction when respondent could have sold the property for sufficient to meet the encumbrances. Indeed, it is to be gathered from the record that the property lies near enough to the center of the city to be somewhat undesirable for residence purposes, and yet not within the business district and desirable for business purposes, and its value is uncertain and speculative.

Notwithstanding the interesting argument presented as to the fair dealing which equity requires of one who acts as trustee, we find nothing in the record which indicates that the respondent has so far failed in any duty which he owes to the appellant, or that any facts are shown which entitle the appellants to any part of the relief asked for in their complaint, or any relief at this time. It might be that issues could be framed, if appellants should elect to so proceed and proof could be adduced, which would warrant a court of equity in finding that the property cannot be sold in the manner contemplated by the agreement between the parties, in which event the court might, upon the prayer of appellants, direct a judicial sale and accounting. But we cannot think that the respondent is entitled to ask for that relief under the conditions shown. The intent of the contract, hereinbefore set forth, in the light of what was contemplated by the parties at the time it was entered into, seems to be that

the respondent shall carry the property until such time as a sale may be made which will net at least the amount of the encumbrances, and since appellants have no right of control, enjoyment of the use, or right to fix the price, or even to be consulted with reference thereto, we see no element of partnership except the division of the net proceeds as provided in the contract, which division is entirely consistent with the relation of principal and agent, trustee and *cestui que trust*, grantor and grantee, and other possible relations. In any event, no breach is shown on the part of the appellants, or either of them, which would justify the granting of any relief to the respondents.

The judgment of the trial court was right and is affirmed.

Since both parties have appealed, neither will recover costs on this appeal.

HOLCOMB, C. J., MOUNT, FULLERTON, and BRIDGES, JJ., concur.

June 1920]

Opinion Per FULLERTON, J.

[No. 15781. Department Two. June 23, 1920.]

In the Matter of the Petition for TUKWILA SCHOOL DISTRICT.

G. R. PAYNE *et al.*, Appellants, v. A. S. BURROWS, as
County Superintendent of Schools for King
County, Respondent.¹

SCHOOLS AND SCHOOL DISTRICTS (1-1)—DISTRICTS—BOUNDARIES—INCORPORATION OF TOWN. The incorporation of a town of the fourth class does not necessarily create a new school district out of the district of which it was formerly a part, under Laws of 1889-90, p. 379, § 64, which provides that each incorporated city or town shall comprise one district, with the provision that city or town districts may be extended a reasonable distance outside the city.

SAME (1-1). The school code, Rem. Code, § 4422, providing that all school districts "now existing * * * * are hereby recognized as legally organized" districts, fixes the status of a district then shown by the records and precludes a claim by a town that it was a district separate and apart therefrom.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 2, 1919, upon findings in favor of the defendant, affirming the decision of the county school superintendent denying a petition seeking the establishment of a school district, after trial to the court. Affirmed.

Robert D. Hamlin, for appellants.

Fred C. Brown and *Howard A. Hanson*, for respondent.

FULLERTON, J. — School District No. 144, of King county, was duly organized as such on April 7, 1904. On June 16, 1908, a part of the territory comprising the school district was incorporated as a town of the fourth class, under the name of the town of Tukwila.

¹Reported in 190 Pac. 1010.

On May 5, 1919, the requisite number of heads of families residing within the town of Tukwila filed with the county superintendent of schools of King county a petition praying that a new school district be organized out of the territory of school district No. 144, the boundaries of which should be coincident with the corporate boundaries of such town. After due notice given, a hearing was had on the petition by the county superintendent and the petition denied. An appeal was taken to the superior court of King county from the order of the county superintendent, where the petition was again heard on its merits and denied. This appeal is from the judgment of the superior court.

In this court the petitioners do not question the correctness of the judgment of the superior court, treating it as a judgment upon an application for the organization of a new district, but contend that, under and in virtue of the statutes existing at the time of the incorporation of the town of Tukwila, the town became *ipso facto* a school district, separate and apart from the district of which its territory then comprised a part, and that the county superintendent and the superior court erred in failing to recognize and treat it as such. The provision of the statute on which the contention is founded reads as follows:

“Each incorporated city or town in this state shall be comprised in one district and under one board of school directors, and in all such cities or towns where the enumeration of school children entitled to draw school money is three hundred or more, the directors shall be required to adopt the graded system of teaching in their schools: *Provided*, That nothing in this section shall be so construed as to prevent the extension of such city or town districts a reasonable distance outside the limits of such incorporated city or town: *And provided further*, That the schools of such cities and towns may be graded in such manner as the

June 1920]

Opinion Per FULLERTON, J.

directors thereof may deem best suited to the wants of such districts." Laws of 1889-90, § 64, p. 379.

It is not contended, if we have correctly gathered the argument, that the language of the body of the section, namely, "Each incorporated city or town in this state shall be comprised in one district and under one board of school directors," necessarily means, when taken alone, that the incorporation of a city or town creates a new school district, but that such must be its meaning if any effect is given to the language of the first of the provisos, since no school district comprised of a city or town could extend its boundaries a reasonable distance outside of its corporate limits unless it is of itself a school district. But we cannot think the reasoning conclusive. If the intent was to provide that the mere act of incorporating a city or town of itself created a new school district, the legislature would have so expressly declared and not left the question to inference. To our minds, the more obvious meaning is that the proviso was intended as explanatory of the language of the body of the section, the purpose being to make it clear that the boundaries of a school district comprising an incorporated city or town need not be confined to the boundaries of such city or town.

But there is another reason which we think controlling in this instance, even if our construction of the statute be wrong. Subsequent to the incorporation of the town of Tukwila, and while its territory was shown on the books of the county school superintendent as forming a part of school district No. 144, the legislature enacted a new code relating to the public schools, which it denominated the "Code of Public Instruction of the State of Washington." In the act, after providing for the classification of school

districts, a method of organizing new districts and of changing the boundaries of existing ones, it further provided:

“That all school districts now existing as shown by the records of the county superintendent are hereby recognized as legally organized districts, subject to the classification of Article 1 of this chapter.” Rem. Code, § 4422.

The evident purpose of this provision was to fix definitely the status of all the then recognized school districts, and set at rest controversies over boundaries and controversies over the question whether any such district was legally organized. Since the town of Tukwila was then shown by the records of the county school superintendent as forming a part of school district No. 144, its status was, by the act, definitely fixed as such, even though it theretofore had the right to assert its existence as an independent school district.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

June 1920]

Opinion Per BRIDGES, J.

[No. 15686. Department Two. June 23, 1920.]

LEWIS COUNTY, *Respondent*, v. AETNA ACCIDENT &
LIABILITY COMPANY, *Appellant*.¹

COUNTIES (46)—CONTRACTOR'S BONDS—ACTIONS—CLAIMS—PAYMENT TO CONTRACTOR—LIABILITY OF SURETY. Where a contract for road work required the contractor to buy cement from the county, and to pay for the same monthly in cash or by deductions from the monthly estimates, and the county neglected to take pay for the cement and paid the contractor in full, it breached the contract and cannot recover for the cement from the surety on the contractor's bond.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered October 6, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

H. E. Donohoe and *C. H. Winders*, for appellant.

Herman Allen and *J. H. Jahnke*, for respondent.

BRIDGES, J.—This is a suit on a road contractor's bond to recover the value of certain cement furnished by Lewis county to the contractor.

In April, 1916, the respondent, Lewis county, entered into a contract with T. H. Cochran & Sons whereby the latter agreed to build a certain county road for \$15,950. All cement to be used by the contractor was to be purchased from the county at \$1.56 per barrel. With reference to payment therefor, the contract provided that, "payments for the cement to the county shall be made not later than the 10th day of the month following the month in which any cement was ordered. Payment for the cement may be made by check to Lewis county, or by the county withholding an amount equal to the price of the cement from the monthly esti-

¹Reported in 191 Pac. 146.

mates." The contract further provided for monthly payments not to exceed seventy-five per cent of the amount due the contractor for the previous month. It was further provided that,

"Final payment for said work shall be made within thirty (30) days after the entire work has been completed and accepted . . . provided, that before the making of such final payment, the contractor shall show to the satisfaction of the board [of county commissioners] that all just dues, debts of laborers, mechanics, materialmen and persons who have supplied such contractor or subcontractor with material or goods of any kind for such work, have been paid."

The contractor gave a bond for the faithful performance of the contract, with the appellant, Aetna Accident & Liability Company, as surety. This bond was conditioned upon the contractor complying with the contract in all of its terms and paying "all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such person or persons or subcontractors with materials, supplies and provisions for carrying on such work, all just dues, debts and demands incurred in the performance of such work."

In the performance of this contract, the county sold to the contractor \$4,073.88 worth of cement. The road was completed and accepted and all the contract price paid to the contractor by the county, but the latter has not received payment for its cement. The county had a judgment in the lower court against the surety. All the other parties to the action were either not served with process or were, by the trial court, dismissed out of the suit.

From month to month, as the work progressed, the contractor was paid seventy-five per cent of the amount he had earned during the previous month. The road

June 1920]

Opinion Per BRIDGES, J.

was completed and duly accepted on November 9, 1916, and at that time the balance found due to the contractor was \$7,949.64. A warrant for this amount was drawn in favor of the contractor. Previously, he had assigned this warrant to the defendant Peninsular National Bank, of St. Johns, Oregon, who subsequently received the same from the county auditor and cashed it with the county treasurer. At all times the county and its officers knew that it had not received any pay for the cement it had furnished. In fact, the testimony shows that the county commissioners and the county auditor intended to refuse to deliver the warrant until the county had been paid, but through some apparent mistake the warrant was delivered without such payment being made, and without the amount owing for the cement being deducted from the warrant. Appellant did not know, before the bringing of this suit, that the bill had not been paid.

This suit was brought more than two years after the delivery and payment of this warrant. The only question before us is whether, under these facts, the county is entitled to recover of the appellant. We are satisfied that the learned trial court erred in giving judgment against the appellant. It is fundamental that the county can have no right to recover on the bond if it has itself breached the contract in any material respect. This we think it did. The contractor was obliged to purchase his cement from the county, and the contract required that,

"Payments for the cement to the county shall be made not later than the 10th day of the month following the month in which any cement was ordered. Payment for the cement may be made by check to Lewis county, or by the county withholding an amount equal to the price of cement from the monthly estimates of the engineer in charge."

A fair construction of this provision of the contract required the county to get its pay monthly, either by receiving the check of the contractor or by deducting the amount from sums earned by the contractor. The county could not look to the contractor or to the surety at its option. The contract provided a way by which it could protect itself, and it was bound so to do. Indeed, the duty of the county was made the plainer by the actions of the parties themselves. After the work was completed, the county auditor wrote the contractor asking him to remit for the cement, and he answered, saying, "we wish you would retain from the amount due us for this improvement, the \$4,073.88 for cement."

The authorities are numerous in support of the proposition that, where the contract requires the county, or other builder, to apply money in its hands belonging to the contractor to the payment of claims or demands against the latter incurred in the performance of the work, it may not pay out to the contractor the balance earned by him and look to the surety for the payment of claims which at all times it knew existed.

In the case of *Greenville v. Ormand*, 51 S. C. 121, 28 S. E. 147, the court said:

"The payment by the city of Greenville to the contractor of the whole amount due under the engineer's estimate, including the ten per cent reserve, without deducting the amount due the city for tools and dynamite, which, under the contract the city had the right to do, was the giving up of a security for the debt sued on upon which the surety had the right to rely."

In *Kiessig v. Allspaugh*, 91 Cal. 231, 27 Pac. 662, 13 L. R. A. 418, the contract for the construction of a building provided that the owner should retain one-fourth of the contract price until final settlement. After the building was completed and accepted, and

June 1920]

Opinion Per BRIDGES, J.

after he knew there were outstanding claims for labor, the owner paid the contractor the balance of the contract price. He then paid the laborers' claims and sought to hold the surety company therefor. The court said:

"The appellant, Lundeen, was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or ought to have been, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it to the contractors. This balance was to be retained in his hands as an additional security against liens upon the building, and in equity, he held the same also for the benefit of the sureties."

In the case of *Taylor v. Jeter*, 23 Mo. 244, the court said:

"The contract duty of this builder was to furnish the materials and do the labor, and he failed in both respects when he allowed the building to be encumbered with these liens. The owner having notice of them, and paying what by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must, therefore, bear the loss occasioned by his own negligence or folly."

To the same effect are *Electric Appliance Co. v. United States Fid. & Guaranty Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609; *City of New York v. Baird*, 132 App. Div. 770, 117 N. Y. Supp. 561.

In the case at bar, the contract not only required the respondent to retain the reserved twenty-five per cent and the last payment until the contractor had paid all claims, but it further obligated the county to see that its cement bill was paid from month to month by de-

ducting, if necessary, proper sums from the monthly or final payments.

Counsel for respondent cite the cases of *Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652, and *Maryland Casualty Co. v. Hill*, 100 Wash. 289, 170 Pac. 594, as opposed to the doctrine which we are here advocating. We think those cases uphold, rather than oppose, our holding here. In the first case, *Costello* had a contract for the building of certain streets in the city of Spokane. The contract obligated him to protect the city from damage resulting from his negligence. Before the work was completed and accepted, one Born was injured through the alleged negligence of the contractor and notified the city of his claim. After that, the city accepted the work and paid the contractor the amount due. Later, Born obtained a large judgment against the city and it sought to hold the contractor's bond therefor. The surety defended on the ground that the city should have retained in its hands sufficient to protect it against this liability. Judge Fullerton, writing the opinion, said:

“The cases cited as maintaining the contrary doctrine are distinguishable from this case in the fact that the contracts there under consideration expressly made it the duty of the owner to withhold of the contract price a specific sum until final settlement between the parties, and the release of the surety was based on the fact that payment of the entire contract price had been made after the owner had notice that claims were made against his property for which the contractor was primarily liable. In other words, the payment was made in violation of the express terms of the contract. But here the facts are different. It will be noticed from the quotation made from the contract that the city was not required to withhold any fixed sum, but it is provided that ‘if in the judgment of the board of public works it shall be necessary to retain a por-

June 1920]

Opinion Per BRIDGES, J.

tion' of the contract price the city may retain such amount as the board may deem necessary."

The opinion then proceeds to show that the contract did not require the city to withhold any sum, but merely authorized it to do so if it saw fit.

In the *Hill* case, *supra*, discussing a similar question, the court said:

"The contract contained no clause requiring the adjustment of these claims as a condition precedent to the contractor's right to payment when the work was completed and accepted. No provision had been made for the retention by the city of any part of the contract price pending the settlement of claims for labor and material furnished to the contractor. In no sense of the term was the contractor in default of his obligation to the city, which had fulfilled the measure of its duty by taking the bond required by the statute."

Where a building contract provides that the owner shall retain in his hands certain moneys earned by the contractor for protection against labor and materialmen's claims, fairness, reason and the authorities require us to hold that the owner, having knowledge of such claims, may not pay to the contractor all the sums earned by him and then look to the surety for reimbursement.

The judgment is reversed, and the cause remanded for dismissal.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15717. Department One. June 23, 1920.]

THE STATE OF WASHINGTON, *on the Relation of C. A. LaGrave, Plaintiff, v. THE CITY OF SEATTLE et al., Appellants.*¹

MUNICIPAL CORPORATIONS (88)—EMPLOYEES—CIVIL SERVICE RULES—TRANSFERS. Under a civil service rule allowing transfers to be made from a position in one department to a similar position of the same class in another department, a vacancy need not be filled from the eligible list, but a transfer may be made pursuant to the rule, which was intended for the protection and promotion of employees already in the service.

SAME (88). Such a transfer would not be illegal because of an increase in the salary, where the former position carried a salary of from \$230 to \$250 a month, and the new position a salary of \$250, and left the employee in the same class, grade and character of work.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 5, 1919, upon findings in favor of the plaintiff, in an action for a writ of mandamus, tried to the court. Reversed.

Walter F. Meier, Geo. A. Meagher, and H. R. Fullerton, for appellants.

Jas. A. Dougan, for respondent.

MACKINTOSH, J.—The respondent seeks by mandamus to compel the city council of Seattle to appoint him to the position of auditor of appropriations in the legislative department, which position was created by ordinance approved the 23d of June, 1919. July 8, 1918, this position was defined by the civil service commission as "accountant, class B, grade 7." At that time the respondent was the only one whose name was on the eligible list for appointment as "accountant, class B, grade 7." This eligible list constitutes

¹Reported in 190 Pac. 906.

June 1920]

Opinion Per MACKINTOSH, J.

the list from which appointees, not already in the city's employ under civil service, are appointed to civil service positions. At that time, one A. T. Drake occupied, in the department of city comptroller, the position of "accountant, class B, grade 7." July 18, the president of the city council, as the head of the legislative department, made application to the civil service commission for the transfer of Drake from his position in the city comptroller's department to the legislative department to fill the position created by the ordinance. The city comptroller consented to the transfer, and on July 19, the civil service commission granted the request for the transfer, and on July 21, Drake was appointed to the position, at the salary of \$250 per month provided for in the ordinance. Drake, while in the city comptroller's department, was receiving a salary of \$230 per month, under a salary ordinance which provided that "accountants, class B, grade 7," should receive a minimum of \$230 and a maximum of \$250 per month. The respondent claims that the appointment to the position created by the ordinance should have been made from the eligible list, and that he, being the only person on said list, was entitled to the appointment, and that the transfer of Drake from one department to another, at an increase of salary, was not authorized by charter and civil service commission rules.

The city charter, as it relates to civil service, contains no provision for transfers, but provides, in § 4, art. 16, that the civil service commission can make rules to carry out the purposes of the article and for "examination, appointment, promotions and removals," in accordance with its provisions, and that it may from time to time make changes in the existing rules. The civil service commission, by rule 10, § 5, subd. B, has provided that transfers may be made

“from a position in one department to a similar position of the same class, grade and character of work, and having the same pay, in another department, providing the heads of the two departments concerned shall make request therefor.” It cannot be contended that this rule is not effective, as it was passed in conformity with the authority given by the city charter and is to be so construed as to produce a harmonious body of civil service regulations, which include the provisions of the city charter on the subject and the rules of the civil service commission. *State ex rel. Washington W. P. Co. v. Savidge*, 75 Wash. 116, 134 Pac. 680; *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645. The rule was passed with the intention of carrying out the purposes of the city charter and provide a means for the city to transfer from one department to another efficient employees as they may be needed in the different departments, and is in accordance with civil service theory in that it protects city employees in their employment, and also affords to the city the opportunity of availing itself of the services of employees in the positions where they will be the most efficient. When new civil service positions are created they may be filled from the eligible list, upon which are the names of those who are not then in the city’s employ, or, with the consent of the civil service commission and the heads of the departments interested, an employee may be changed from one department to another, provided, that the employee is transferred to a similar position of the same class, grade, character of work, and having the same pay.

As was said in *Jenkins v. Gronen*, 98 Wash. 128, 167 Pac. 916, L. R. A. 1918A 839:

“The evident purpose of the framers of the charter was to make free and open the opportunity to enter

June 1920]

Opinion Per MACKINTOSH, J.

the public service, and to secure from the persons applying those shown by tests to be the best qualified for the service. These purposes are not accomplished if anything is left to the whim or caprice of the appointive power."

It was not the intention that the city's payroll should be added to by new employees if there were already on the roll those whose services could be used in some other department; thus securing trained men as well as preventing the increase of needless employees. Contrary to quite general results, the primary purpose of civil service is not to provide unnecessary permanent positions for theoretically competent incumbents.

The respondent bases his contention that Drake was improperly transferred for the reason that, in the new position, he received a compensation of \$250 per month, whereas, in the old position, he received but \$230. Under the facts of the case, we cannot agree with this contention, as we have come to the conclusion that neither the letter nor the spirit of the rule was violated in this instance. As we look at the rule, it, in spirit was in part intended for the protection of employees, and aimed to provide that, by the subterfuge of transferring from one department to another, a civil service employee was not to be subjected to a decrease of pay, but provided his new position must be of the same class and character as that in which he was then employed, and that he should receive no less compensation in the new position than he was receiving in the old. In other words, the rule was passed in conformity with the general spirit permeating the civil service theory of public employment, and was intended to prevent the accomplishment indirectly of what was prohibited directly. It was meant to forbid the demoting of employees or decreasing their pay, so

that, by an indirect method, they might be compelled to relinquish their employment, when no reason sanctioned by the civil service regulations provided for their direct removal. So much for the spirit of the rule.

Nor do we think that the action taken by the heads of the departments in this instance violated the letter of the rule. Drake, at the time he was changed from the city comptroller's department to the legislative department, was occupying a position in the former department which was listed as carrying a salary of from \$230 to \$250 per month, and was removed into a department which paid \$250 per month. It is conceded that the change left him in the same "class, grade and character of work," and it would seem that the new position carried the "same pay." The record shows that the work he was to perform in the new position was identically the same as that he had been performing in the old, that merely the authority over the position was transferred from one department of government to another, and had he remained in the city comptroller's office, under the salary list, it would have been proper to have increased his pay there to \$250 per month without the violation of any rule or regulation, and this increase might have been made by the city comptroller previous to the comptroller's giving his consent to the transfer, and then there could have been no question but what the transfer could have been made without raising any question as to the "same pay." The rule as to transfers is applicable for the reason that Drake was transferred from a position the pay of which had been fixed by ordinance at from \$230 to \$250 per month, to another position which paid \$250 per month, and the transfer, therefore, took place to another position of the same "class, character of work and grade," and having the

June 1920]

Opinion Per MAIN, J.

"same pay," and therefore was legal. That being true, the respondent was not entitled to the position, and his application for a writ of mandate should have been denied. Judgment reversed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ., concur.

[No. 15923. Department One. June 25, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. WALDEN J. TERRIEN *et al.*, *Appellants*.¹

APPEAL (288)—RECORD—STATEMENT OF FACTS—EXTENSION OF TIME—DISMISSAL. The filing of a statement of facts or bill of exceptions within the statutory period is jurisdictional, and thereafter the time cannot be extended; but this does not prevent the review of errors that arise upon the record aside from the statement or bill.

SAME (329, 338)—TRANSCRIPT AND BRIEFS—SERVICE AND FILING—EXCUSE FOR DELAY. The failure to file a transcript and briefs within time is not jurisdictional, and the time may thereafter be extended for good cause, in the discretion of the court.

Motion to dismiss an appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered January 29, 1920. Denied.

Ralph S. Pierce, for appellants.

Arthur McGuire and *C. R. Hadley*, for respondent.

MAIN, J.—This is a motion by the respondent to dismiss the appeal because, first, a transcript of the record has not been filed by the appellants within the time fixed by law, or at all. Second, that no statement of facts or bill of exceptions has been filed within the time fixed by law, or at all; and third, that no brief on appeal has been served or filed by the appellants.

¹Reported in 190 Pac. 1017.

The appellants admit failure to comply with the statutory requirements as to the filing of a transcript, statement of facts and brief. They resist the motion to dismiss and ask that the time for perfecting their appeal in this court be extended until the first day of August, 1920. The facts which it is claimed excuse the delay are shown by affidavit.

We will first consider the effect of the failure to file a statement of facts or bill of exceptions within the ninety-day period fixed by statute. Under the holdings of this court the filing of the statement of facts or bill of exceptions within the statutory time is jurisdictional and, after this time has expired, the court cannot extend the time and permit a statement of facts or bill of exceptions to be filed. *American Fuel Co. v. Benton*, 98 Wash. 26, 167 Pac. 346; *Universal Motor Co. v. McGeorge*, 104 Wash. 344, 176 Pac. 331. It does not follow, however, that the appeal should be dismissed because no bill of exceptions or statement of facts has been filed within the time fixed by law, and because the court cannot now extend the time. The appellants still have the right to present any question which may arise upon the record, aside from the bill of exceptions or statement of facts.

The failure to file a bill of exceptions or statement of facts not requiring the dismissal of the appeal, the next question to be considered is whether the appeal should be dismissed because of failure to file the transcript and serve and file the briefs in accordance with the statutory requirements. The failure to file the transcript and serve and file the briefs within the time fixed by law is not jurisdictional and the court may, if good cause be shown, extend the time or permit the brief and transcript to be filed after the expiration of the statutory period. *Northwestern etc. Bank v. Griffiths*, 18 Wash. 69, 50 Pac. 591; *Prescott v. Puget*

June 1920]

Opinion Per MAIN, J.

Sound Bridge & D. Co., 30 Wash. 158, 70 Pac. 252; *Ellis v. Bardin*, 36 Wash. 122, 78 Pac. 177; *Weiffenbach v. Puget Sound Bridge & D. Co.*, 103 Wash. 240, 174 Pac. 10. Whether this appeal should be dismissed for failure to file the transcript and serve and file the brief within time depends, therefore, upon whether sufficient excuse has been shown for the delay. Without reviewing in detail the facts which it is claimed show excusable neglect, it may be said that, in our opinion, a sufficient excuse has been shown, and the court in the exercise of its discretionary power will permit a transcript and brief to be filed. The case in the ordinary course would not have reached this court for assignment at the present May term. The delay has not, therefore, resulted in a postponement of the hearing here on appeal. The appellants' time for perfecting their appeal in this court will be extended to August 1, 1920.

The motion to dismiss the appeal is denied.

HOLCOMB, C. J., PARKER, MITCHELL, and FULLERTON, JJ., concur.

[No. 15789. Department Two. June 25, 1920.]

ROY CASEY, *a Minor, by his Guardian ad Litem,*
Henrietta Casey, Appellant, v. C. W. WILLIAMS,
*Respondent.*¹

LANDLORD AND TENANT (77, 83)—DEFECTIVE PREMISES—INJURY TO TENANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY. There being substantial evidence that a landlord had notice of the defective condition of a porch railing, which gave way and injured a tenant, who was not guilty of contributory negligence, it was error to direct a verdict for the defendant notwithstanding a verdict for the plaintiff for the personal injuries sustained.

APPEAL (488)—DECISION—REMAND FOR FURTHER ACTION. Upon reversing a judgment for defendant, notwithstanding the verdict of a jury for the plaintiff, judgment will not be entered on the verdict when the trial court did not dispose of defendant's motion for a new trial.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 18, 1919, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor through the breaking of a porch railing. Reversed.

J. W. Anderson, for appellant.

Emil N. Stenberg, for respondent.

FULLERTON, J.—On August 5, 1916, the respondent, being then the owner of a certain house and lot situated in the city of Tacoma, leased the same to the appellant guardian and one Rinke. The house was a two-story structure. On the back side of the house was a porch, enclosed on the open side by a balustrade, the railing of which was fastened by nails to the upright supports of the porch. The evidence tended to show, and the jury were warranted in finding, that, at the time of

¹Reported in 190 Pac. 1011.

June 1920]

Opinion Per FULLERTON, J.

the rental, the landlord was informed that Rinke, with his family, intended to occupy the lower story, and that the guardian, with her family, consisting of herself, a minor son and a minor daughter, intended to occupy the upper story. The parties moved into the house some four days after the lease was entered into, and two days later the minor son went onto the porch, and while there started to pass or throw to his sister, who was on the ground below, a magazine or some like periodical. In doing so, he laid his hand upon the railing of the balustrade mentioned, and possibly leaned thereon, when it gave way, falling to the ground below and carrying the boy with it. From the fall the boy received severe and permanent injuries. In this action recovery is sought for the injuries so suffered. The cause was tried to a jury, which returned a verdict in favor of the appellant for two thousand dollars. A motion for judgment notwithstanding the verdict, or the alternative for a new trial, was interposed, and the first branch of the motion was sustained. A judgment of dismissal followed, and from the judgment, this appeal is prosecuted.

The reasons which actuated the court in sustaining the motion are not disclosed by the record, save as they can be gathered from the arguments of counsel opposing and supporting the judgment entered. On many of the material issues we find no substantial dispute in the evidence. That the respondent is the owner of the premises; that he leased them to the mother of the injured boy; that the part of the porch which gave way was defective and dangerous and not discoverable by ordinary inspection; that it did give way when put to use by the boy; that, by reason thereof, he received severe and permanent injuries, and that he was guilty of no negligence which contributed to his injury, the evidence abundantly sustains. Indeed, it seems to us

that the jury could hardly have reached an opposing conclusion.

The only question upon which there is any substantial dispute is whether the respondent, at the time the lease was entered into, had actual knowledge of the defect. The evidence on the question is that of a former tenant, who testified to the defective condition of the porch and of having informed the respondent of the fact. The porch is a double structure having a floor leading out from each of the stories, and it is contended that the former tenant's evidence is uncertain in that it is not clear as to which part of the porch he was referring. But to our minds this question is hardly in doubt. The evidence was directed entirely to the condition of the upper part of the porch, and, even were his statements entirely general, the inference would follow that he was referring to the part in dispute. But it was not thus general. His attention was called specially to the railing which gave way, and he testified that it was loose and dangerous and that he told the respondent of its condition. We can but conclude, therefore, that the court was in error in his holding that there was no substantial evidence to support the verdict.

The appellant asks us to direct the entry of a judgment in accordance with the verdict. But the motion for a new trial was not disposed of by the trial court, and the respondent is entitled to have its judgment upon that question. The judgment entered will, therefore, be reversed and the cause remanded with instructions to pass upon the motion for a new trial. If the motion is granted, a new trial will be had as of course; if overruled, the court will enter judgment in accordance with the verdict.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ.,
concur.

June 1920]

Opinion Per FULLERTON, J.

[No. 15832. Department Two. June 25, 1920.]

JESSIE SCHULTZ, as *Administratrix etc.*, Plaintiff, v.
WESTERN FARM TRACTOR COMPANY *et al.*, Defendants,
WILLIAM ROBERT SCHULTZ, Intervener,
Respondent, JESSIE SCHULTZ, Intervener,
Appellant.¹

DEATH (13, 14)—PERSONS ENTITLED—DIVISION OF DAMAGES. The statute having failed to apportion the damages recoverable by defendants for wrongful death, a division of \$1,600 to a widow, and \$650 to a minor son, will not be set aside on the widow's appeal, in view of the financial condition of the parties and the fact that the widow, recently married to deceased, received life insurance and the deceased's back pay, some \$2250, and that the son was a cripple, all of which are proper matters for the consideration of the court.

PARENT AND CHILD (4-1)—DUTY TO SUPPORT. The parent's duty to support a crippled child does not cease at the age of majority, but continues as long as the necessity exists.

Appeal from an order of the superior court for Pierce county, Chapman, J., entered September 17, 1919, distributing a fund paid into court in settlement of an action for wrongful death, after a hearing before the court. Affirmed.

Burkey, O'Brien and Burkey, for appellant.

F. B. Churchill, for respondent.

FULLERTON, J.—On August 28, 1918, one Albert W. Schultz was injured by an automobile driven by an employee of the Western Farm Tractor Company, dying from the effects of the injury on the day following. Schultz left surviving him a widow, and a minor son by a former wife. The widow was appointed administratrix of his estate, and later on began an ac-

¹Reported in 190 Pac. 1007.

tion against the tractor company in damages as for wrongful death, for the benefit of herself and the minor son. Issue was taken on the complaint, but before the action was brought on for trial, the parties compromised their differences, the tractor company paying into court twenty-two hundred and fifty dollars in settlement of the action. After the payment of the money into court, the parties entitled thereto applied for a distribution of the fund. At the hearing on the application, their claims proved antagonistic, and the court took evidence as to the degrees of dependency of the respective claimants, finally entering an order dividing the fund by giving to the widow sixteen hundred dollars and to the son six hundred and fifty dollars. From the order, the widow appeals.

The statute which gives a right of action for wrongful death (Laws of 1917, p. 495), while providing that such an action may be maintained by the personal representative of the person whose death is wrongfully caused, for the benefit of certain designated relatives of such person, does not in terms prescribe any rule by which the fund is to be apportioned. Seemingly it could be contended with some plausibility that an equal division was intended, or, at least, where, as here, there is a widow and a child entitled to share, the widow's portion could not exceed one-half. But as the case is presented, it is unnecessary to determine the question. The child, who received the minor part, is not complaining and has not appealed.

Meeting the question on the ground chosen by the parties, we see no reason to change the award. At the time of his marriage with the present appellant, Mr. Schultz was well along in years. He had at that time no property whatsoever, but was dependent entirely on his personal labor for his support. The marriage occurred but thirteen months prior to his death, and

June 1920]

Opinion Per FULLERTON, J.

there was not that degree of dependency upon him on the part of the wife that usually arises where the marriage relation is long standing and the wife, from the very nature of the relationship, becomes unfit to take up a gainful occupation. Moreover, the wife received his life insurance, some two thousand dollars, and the money he had received as "back pay" for his labors, some two hundred and fifty dollars more. True, the appellant says that these are considerations immaterial to the question in hand, and cites authorities to maintain the position. But an examination of them convinces us they are not in point. One of the inquiries here was the financial condition the parties were left in because of the death, which was not so in the instances cited, and it seems to us clear that the property received by either claimant arising from the death is a proper subject of inquiry.

On the other hand, the son had a substantial claim on his father's bounty. He is a cripple. In his early boyhood, because of some misfortune which had overtaken him, his left arm was amputated at the shoulder. He has but a moderate education and there are, in consequence, but few pursuits open to him by which he can earn a livelihood. From his birth until his early youth he was supported entirely by his father, and from the time he began to do something for his own support, up to the time of his father's marriage with the appellant, if not up to the time of his death, he has been a recipient of a part of his father's somewhat meager wage. This is cut off by the death of his father, and to him it is a serious loss.

The appellant contends that, in any event, the award is too large. She calls attention to the fact that, had the monthly sums the son claims to have received from his father been continued up to the time he would

reach the age of majority, it would not amount to the sum awarded him, and argues that the sum he would have so received is the measure of his loss. But the argument is hardly conclusive. Doubtless the legal duty of a parent to support his normal children ceases at the age of majority, but the rule is not the same with respect to his defective children, whether the defect be mental or physical. To these he owes a continuing obligation of support, which ceases only when the necessity for support ceases.

There was no error in the order and it will stand affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15369. Department Two. June 29, 1920.]

ABEL WHITE, *Appellant*, v. JOHN C. WHITE *et al.*,
Respondents.¹

WILLS (5, 7)—TESTAMENTARY CAPACITY—INSANITY—EVIDENCE—SUFFICIENCY. Mental capacity to execute a will is sufficiently shown notwithstanding physicians examined the testatrix about a year previously and testified that she was then an incompetent, suffering from senile dementia, a progressive and incurable disease, where she lived for nearly three years thereafter, her condition became much improved, she died from another disease, and witnesses testified that she comprehended the transaction.

SAME (20)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. Undue influence to make a will in favor of one who had acted as guardian for testatrix while she was incompetent is not established by the mere fact of the fiduciary and confidential relations existing between her, the guardian, and the attorney who drew the will.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 20, 1919, upon findings in favor of the defendants, dismissing an action to contest a will. Affirmed.

¹Reported in 190 Pac. 1003.

June 1920]

Opinion Per MOUNT, J.

E. N. Eisenhower and Bates & Peterson, for appellant.

Herr, Bayley & Croson, F. D. Oakley, and M. F. Porter, for respondents.

MOUNT, J. — This action was instituted by Abel White to set aside a will made by his sister, Harriet Young, deceased. The petition alleges, in substance, that the testatrix was incompetent to make the will in question, and that the will was executed under and because of undue influence exerted upon her by John C. White and M. F. Porter. The case was tried to the court and a jury. The jury returned a verdict in the form of special interrogatories, finding in substance that the testatrix, at the time she made the will in question, was not competent to make a will, and that the will was the result of undue influence exercised by John C. White or other persons. On the return of this verdict, which the trial court treated as advisory, the court reversed the findings of the jury, and after finding the facts in the case, concluded as follows:

“That at the time of the execution of her last will, the deceased had very largely recovered from the weakened condition which existed during the summer of 1915; that she had sufficient mental power and capacity to understand what she was doing and to know her property and to remember her friends and relatives, and that the said will was duly and properly executed by her without any undue influence on the part of John C. White, M. F. Porter, or any other person, and that the said will as admitted to probate in the court on June 1, 1918, is the last will and testament of the said Harriet Young, deceased, and was properly so admitted.”

The trial court thereupon dismissed the proceedings. The petitioner has appealed from that judgment.

The only questions presented in the case are ques-

tions of fact, as stated by counsel for appellant in their brief as follows:

“1st. Was Harriet Young, on June 29th, 1916, competent to make a valid will?

“2nd. Was the paper signed by her on that day the result of undue influence exercised by John C. White and other persons?”

But for the fact that the trial court and the jury, after listening to the evidence, arrived at directly opposite conclusions, we would be satisfied to say that the facts as found by the trial court were amply sufficient to justify the court's finding. In view of the fact that the trial court and the jury do not agree in their conclusions upon the facts, it may be well to state some of the more important contentions of the parties hereto. The following facts, we think, are not disputed: Harriet Young, the testatrix, died in the Dunlap Hotel at Puyallup, on May 27, 1918. Her nearest surviving relative at that time was her brother, Abel White. At the time of her death she had property, consisting of real and personal property, of the value somewhere between \$60,000 and \$80,000. On June 29, 1916, she was eighty-five years of age. At that time she executed a will drawn by M. F. Porter, who had been for several years her attorney and confidential adviser and who prepared the will at her request. According to the terms of this will, she left a farm near the town of Sumner, in Pierce county, Washington, to a nephew, John C. White, and, also, \$8,000 in cash. The rest, residue and remainder of her estate, not to exceed \$50,000, she devised to certain named persons, in trust, for the purpose of incorporating and maintaining a charitable institution in the town of Puyallup, Washington, to be known as the “Harriet Young Young Men's Christian Association.” The will provided that the further residue was charged with the

June 1920]

Opinion Per MOUNT, J.

payment of twenty-five dollars per month to Lewis McAdams and Willis Y. McAdams, nephews of the said deceased, who were also to be given rooms without charge in said Y. M. C. A. building.

In the year 1915, the deceased was induced by one Barron to make a sale of her farm near Sumner. This sale was made for a wholly inadequate price and upon unreasonable terms. Upon hearing of this sale, Mr. Porter brought an action in the superior court of Pierce county to set aside the sale. Thereafter a petition was filed in the superior court of Pierce county, alleging that Mrs. Young "has by reason of her advanced age and bodily infirmities, become mentally incompetent either to care for herself or to manage her property." Upon the hearing of this petition, the doctors who had called to see her and had heard evidence of her manner of life testified that she was afflicted with senile dementia at that time. The court thereupon found that she was incompetent to take care of her business, and her nephew, John C. White, was appointed guardian of her estate. Thereafter this guardian was substituted as a party plaintiff, and, upon issues joined, the transaction with Mr. Barron was set aside. Thereafter Mr. White continued as guardian of her estate. He transacted all her business.

In October of 1915, the deceased was taken to the Dunlap Hotel in Puyallup, where she lived from that time until her death, which occurred in May, 1918.

The appellant contends that the deceased was incompetent to make a will in June of 1916, because at that time she was suffering from senile dementia and was incompetent to manage her own affairs, and because a guardian had been appointed a year previously to care for her estate. There is testimony in the record by doctors who, in answer to hypothetical questions detailing her condition both prior and after the

year 1915, stated that it was their opinion she was afflicted with senile dementia. All the doctors who testified in the case seem to agree that this disease is a progressive disease, that it is one which destroys the brain cells and permits of no improvement or recovery, but grows gradually worse until death. We think it is undisputed—at least the great weight of the evidence is to the effect—that nearly three years after physicians testified that Mrs. Young was afflicted with senile dementia she did not die of that disease, but that her death was caused by bronchial pneumonia, and that, prior to the time she contracted this disease, she was much improved mentally. So it is apparent that whatever caused her affliction in 1915, it was not senile dementia. If not senile dementia at that time, it was not senile dementia later. We think the evidence to the effect that, prior to her affliction in 1915, she had lived alone upon her ranch without sufficient nourishment and had been quite sick on a number of occasions, sufficiently explains the cause of her condition in 1915, and that she was temporarily, rather than permanently, incapacitated at that time. We are satisfied, after a careful reading of the abstract of the evidence, that Mrs. Young was not afflicted with senile dementia in June of 1916, and we are also satisfied that she was free at that time to make her will. We said in *In re Murphy's Estate*, 98 Wash. 548, 168 Pac. 175, quoting from *Points v. Nier*, 91 Wash. 20, 157 Pac. 44, Ann. Cas. 1918A 1046, regarding a will, "suspicion, however great, is not enough to nullify it."

"This court has laid down the rule in the case of *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385, quoting from Redfield on Wills, as to what the quantum of mental capacity to make a will is, as follows:

" 'The result of the best considered cases upon the subject seems to put a quantum of understanding requisite to the valid execution of a will upon the basis

June 1920]

Opinion Per MOUNT, J.

of knowing and comprehending the transaction, or, in popular phrase, that the testator should at the time of executing the will know and understand what he was about.'

"We hold the view that the right to dispose of one's property by will is one assured by the law and is a valuable incident to ownership, and does not depend upon its judicious use."

Prior to the time the testatrix executed the will in question, she had executed at least four other wills, and in each of these wills she had made provision for some charitable purpose similar to the one here in question, and in those wills she provided for her brother to the extent of \$100. At the time she requested this will to be drawn, she stated to Mr. Porter, whom she employed to draw the will, that she would give her brother \$100, because she was afraid he would attempt to set her will aside unless she gave him something. When informed that was not necessary, she directed that nothing be left to her brother. She had a number of nieces and nephews, for none of whom, except the McAdams boys, had she made provision in any of her previous wills. The main difference between this will and other wills is that, in the other wills, her nephew, John C. White, was not mentioned. In this will he received a large portion of her property. We think there is nothing unnatural in this, because Mr. White had for several years been caring for her and her property. She had trusted him implicitly and had told him upon different occasions that she expected to remunerate him by her will. We think the whole evidence bears out the conclusion of the trial court that she was in her right mind, capable of disposing of the property, and did so as she desired it to go.

Upon the question of undue influence, we failed to find any evidence that either Mr. Porter or Mr. White

induced the testatrix to make the will she did, or any will. It is argued by the appellant that the fiduciary relationship and confidential relations existing between the testatrix and her guardian and her attorney, M. F. Porter, are sufficient to show undue influence. While there were confidential relations existing between these parties, we think the evidence conclusively shows that relation was not used in any way to influence the testatrix in making her will. She had said to John C. White upon different occasions that she intended to give him her property, and he in turn said to her that she ought to remember her other relatives. When she asked Mr. Porter to draw the will, Mr. Porter inquired very carefully concerning the disposition she desired to make of her property, and, after the will was drawn, he gave it to her and told her to read it over and study it carefully, and if she was not satisfied with it to return it to him and he would change it, or words to that effect. She took the will after it was drawn and kept it for several days before it was finally executed.

Some contention is made by the appellant to the effect that one of the witnesses was a doctor, and that this of itself is a suspicious circumstance. It is true that the doctor was a witness to the will. He had treated her professionally. He examined the testatrix before he signed the will as a witness to determine her qualification at that time, and he concluded that she was qualified and, therefore, signed the will as a witness. Considering all the circumstances, there is nothing in this to warrant criticism.

We are satisfied from all the evidence in the case that there was no undue influence, and that the testatrix was fully competent to execute the will.

June 1920]

Opinion Per MOUNT, J.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15534. *En Banc*. June 29, 1920.]

SLOAN SHIPYARDS CORPORATION, *Appellant*, v. THURSTON
COUNTY *et al.*, *Respondents*.¹

TAXATION (18)—ASSESSMENT—OWNERSHIP OF PROPERTY—CONTRACT—CONSTRUCTION. Materials assembled by and under the control of a shipbuilding company, listing the same as the owner, must be considered as its property for the purpose of taxation, notwithstanding a contract between it and the Emergency Fleet Corporation, which provided that the latter should, as between the parties, be considered the owner of materials ordered or assembled in the yard, "to the extent of the payments made thereon," in the absence of evidence of payments on the particular material assembled; and the Fleet Corporation is not shown to be the owner by evidence that the shipbuilding company had earned but \$2,170,700 on its contract and that the Fleet Corporation had advanced \$3,144,700 thereon, under a contract calling for only partial payments as the work progressed.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered May 28, 1919, upon findings in favor of the defendant, dismissing an action to cancel a tax, tried to the court. Affirmed.

Frank C. Owings, for appellant.

Thos. L. O'Leary and *W. W. Manier*, for respondents.

MOUNT, J.—This action was brought to cancel a tax levied against the property of the plaintiff. The complaint alleges that the property assessed to the plaintiff was not its property and that it did not own the property on the first day of March, 1918, the date fixed

¹Reported in 190 Pac. 1015.

by law when the property was required to be assessed. Upon issues joined, the case was tried to the court without a jury. The court found that the property was the property of the plaintiff, and for that reason dismissed the action. The plaintiff has appealed.

There is no dispute upon the facts, which may be briefly stated as follows: The appellant is a corporation owning a shipbuilding yard and plant in the city of Olympia. On the 11th day of March, 1918, the assistant treasurer of the appellant made a detailed list of the personal property of the appellant for the purpose of assessment, as follows:

| Items of Property | No. | Assessed Value |
|---|-----|-------------------|
| Donkey and logging engines, pile drivers, hoisting engines, etc..... | 7 | \$30,000.00 |
| Lumber (M feet)..... | .. | 100,000.00 |
| Manufacturers' materials and manufactured articles, including brick, stone, building materials, etc.... | .. | 225,000.00 |
| Manufacturers' tools, implements, and machinery, including engines and boilers and donkeys..... | .. | 220,000.00 |
| Total..... | | \$575,000.00 |

This list was returned to the assessor of Thurston county and the assessor accepted the figures as the true value of the property, and fixed the value of this property for taxation purposes for the year 1918 at the sum of \$287,500, the same being fifty per cent of the true value, which method prevailed in assessing all other property in Thurston county. The total tax levied for all purposes for that year was 59.63 mills. The tax levied against the property of the appellant was \$17,143.63. After the assessment, no complaint was made to the county commissioners or the board of equalization. Thereafter the levy was made and the county of Thurston distributed the taxes to the state, the city and the school district, as required by law. Thereafter the appellant made a tender to the treas-

June 1920]

Opinion Per MOUNT, J.

urer of Thurston county of the sum of \$7,453.75, claiming that this was the amount of tax it owed upon the property which it owned. The treasurer refused to receive this amount in full payment, and this action was brought to set aside all of the tax levied, except the sum of \$7,453.75, which was tendered to the county and the tender made good.

It was the duty of the appellant, upon the trial of the case, to show that it did not own the property which was assessed against it. It was admitted upon the trial, and is admitted here, that the appellant was the owner of the first and fourth items in the detailed list furnished by the appellant to the county assessor, but that it was not the owner of the second and third items therein on the first of March, 1918, because at that time these items were owned by the United States Shipping Board Emergency Fleet Corporation, and that the property of that corporation was not subject to taxation. In order to show this fact, the appellant offered in evidence a contract entered into between the appellant company and the United States Shipping Board Emergency Fleet Corporation (hereinafter referred to as the Emergency Fleet Corporation), which contract provided for the construction of sixteen wooden ships by the appellant for the Emergency Fleet Corporation. This contract provided, among other things, for the payment for these vessels as follows: (1) That eleven per cent, or \$53,900, should be paid on each ship within thirty days after signing the contract, upon production of a sworn statement that the contractor had theretofore expended or was committed on material contracts for expenditures on the work under the contract in an amount equal to such payment; (2) that eleven per cent, or \$53,900, should be paid on each ship within sixty days after signing

the contract, upon production of a like sworn statement; (3) that thirteen per cent, or \$63,700, should be paid when the keel of each ship was laid and half in frame; (4) that thirteen per cent, or \$63,700, should be paid when all in frame, and the keelsons of each ship in; (5) that thirteen per cent, or \$63,700, should be paid when the ship was three-fourths sealed, bottoms and bilges planked; (6) that thirteen per cent, or \$63,700, should be paid when cabin work was one-third completed; (7) that thirteen per cent, or \$63,700, should be paid when engines were ready for shipment from constructor; and (8) that thirteen per cent, or \$63,700, should be paid upon acceptance of the ship after sea trial. Paragraph VI of this contract provided as follows:

“It is agreed that as the payments provided therein are made by the owner (Emergency Fleet Corporation) on account of materials ordered by or assembled or set up in the yard of the contractor (appellant) or used in the construction thereunder, the same to the extent of the payments made shall become the property of the owner.”

It was shown upon the trial that, prior to March 1, 1918, the Emergency Fleet Corporation had advanced to the appellant the sum of \$3,144,800, and that the appellant had earned up to that time \$2,170,700. It is argued on these facts that the Emergency Fleet Corporation was the owner of the lumber and manufacturers' material, amounting to \$325,000, listed by the assessor as the property of the appellant. We think this falls far short of proving that the Emergency Fleet Corporation at that time was the owner of these particular materials. The provision of section VI of the contract, above quoted, is to the effect that the Emergency Fleet Corporation shall be, as between

the parties to the contract, the owner of materials ordered or assembled or set up in the yard of the contractor *to the extent of the payments made thereon*. On the first of March, 1918, when the assessment was required to be made, the appellant was in possession of the ship yards and had control thereof and had possession of all the personal property therein situated. Provision VI of the contract between the appellant and the Emergency Fleet Corporation simply gave the Emergency Fleet Corporation a lien upon the materials in the yard to the extent of the payments made upon those particular materials. The extent of those payments was not shown, but even if shown, as between the appellant and all the world besides the Emergency Fleet Corporation, the appellant owned all the property in its possession.

The rule in regard to the ownership of property for the purpose of taxation is stated in 37 Cyc. at page 788, as follows:

“Ordinarily and in the absence of statute to the contrary, property is taxable only to the person who is the owner thereof at the date for its listing or assessment, or the date fixed by statute as of which its ownership for purposes of taxation is to be determined; and taxes are not a lawful charge on property unless assessed in the name of its owner, and any attempt to enforce the payment of taxes assessed and charged to the wrong person will be ineffective. This does not mean that the person assessed must have a perfect and unencumbered title to the property, but only that he should be vested with the apparent legal title, or with the possession coupled with such claims and evidences of ownership as will justify the assumption that he is the owner; and assessors are not required to go behind the records and search out unrecorded transfers or anticipate the judicial settlement of a title which is in litigation.”

See, also, 26 R. C. L. § 315.

We think this must necessarily be the correct rule. It follows, therefore, that since the appellant was in possession of this property, claiming to be the owner and being the actual owner as to everybody except the Emergency Fleet Corporation, and representing to the assessor that it was the owner, and having the apparent legal title coupled with possession, is sufficient evidence of ownership in the appellant. We are satisfied, therefore, that the trial court properly found that the appellant, for the purpose of assessment, was the owner of the property on the first day of March, 1918. and is therefore liable for the whole tax.

Both appellant and respondent in their briefs have devoted considerable space to an argument upon the question of estoppel. Since we have concluded that the property in question was, for the purposes of taxation, the property of the appellant on the first day of March, 1918, it is unnecessary to consider the question of estoppel.

The judgment appealed from is therefore affirmed.

ALL CONCUR.

June 1920]

Statement of Case.

[No. 15655. Department Two. June 29, 1920.]

MINNIE TEED, *Respondent*, v. BROTHERHOOD OF
AMERICAN YEOMEN, *Appellant*.¹

INSURANCE (26)—INSURABLE INTEREST—DIVORCED WIFE. Where, at the time of granting a divorce to a wife who was the beneficiary named in a policy of fraternal insurance, the certificate was delivered to her, her insurable interest did not expire upon the procurement of the divorce; and the existence of an insurable interest at the maturity of the policy is unnecessary to enable her to collect thereon.

INSURANCE (207)—STATUTES (83)—WHO MAY BE BENEFICIARIES—DIVORCED WIFE—RETROSPECTIVE LAWS. Rem. Code, § 6059-211, passed in 1911, limiting the payment of fraternal benefits to a wife and certain relatives, does not operate retrospectively, so as to avoid a certificate that, prior to 1911, named as a beneficiary a wife who was thereafter divorced; especially in view of § 6059-221 which provided that nothing in the act should prevent any society from continuing all contracts theretofore made in this state.

INSURANCE (203)—FORFEITURE—ESTOPPEL OR WAIVER—POWERS OF LOCAL AGENT. A fraternal insurance company is estopped to claim that a divorced wife was not a legal beneficiary, where, on application to change the beneficiary to a son, the local officer, charged with the duty of collecting dues, advised against the change as unnecessary and the company thereafter accepted premiums paid by the divorced wife.

INSURANCE (161)—LIMITATION OF ACTIONS—DEATH NOT KNOWN. The provision in a benefit certificate that no action thereon shall be maintained unless brought within one year of the date of the death, does not bar an action where the death of the member was not known to either the beneficiary or the society within the year, and all dues were regularly paid.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 9, 1919, in favor of the plaintiff, in an action on a benefit certificate, tried to the court. Affirmed.

John D. Denison and Grass & Horr, for appellant.

Gay & Griffin, for respondent.

¹Reported in 190 Pac. 1005.

MOUNT, J.—This action was brought to recover upon a fraternal beneficiary policy of insurance. It was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for \$899.80, with interest. The defendant has appealed from that judgment.

There are no disputed facts in the case. The facts may be stated briefly as follows: The appellant is a fraternal beneficiary association organized and doing business under the laws of the state of Iowa, and authorized and licensed to do business in this state. On June 28, 1900, it entered into a contract with Benjamin F. Teed, of Kent, Washington, under which it issued to him the benefit certificate in question. Under the contract, the insured agreed to be bound by all the laws of the defendant association "now in force and which may hereafter be adopted and which are hereby made a part of this contract." In this benefit certificate as originally issued, Ella Teed, related to the insured as wife, was named as beneficiary. Thereafter Ella Teed died, and on October 7, 1907, Margaret Hodden, related to the insured as mother-in-law, was named as beneficiary. Thereafter, on the 27th day of March, 1909, the insured married Minnie Teed, respondent. And on the 27th day of July, 1909, Minnie Teed, then related to the insured as wife, was, in accordance with the by-laws of the appellant association, substituted as beneficiary.

In October of 1909, Minnie Teed also took out a benefit certificate in the appellant association, and in this certificate her husband, Benjamin F. Teed, was named as beneficiary. Under some agreement between Minnie Teed and her husband after these beneficiary certificates were issued, Mrs. Teed has continually paid the dues for both certificates to the appellant company.

June 1920]

Opinion Per MOUNT, J.

On the 17th day of September, 1913, Minnie Teed and Benjamin F. Teed were divorced. At that time the certificate of insurance upon the life of Benjamin F. Teed was delivered to Mrs. Teed. She has retained possession thereof ever since. After the divorce, Mrs. Teed and Mr. Teed desired to have the certificates of insurance changed so that the beneficiary named therein should be the grandson of Mrs. Teed. They made application therefor to the local correspondent of the appellant at Kent, and were then advised by the local correspondent not to make such transfers because the policies were valid, but to allow the policies to stand as they were and to continue to make their payments. This method was afterwards pursued.

On April 3, 1916, while these certificates of insurance were in full force and the dues were fully paid, Benjamin F. Teed died. The respondent, Minnie Teed, at that time was absent from the state of Washington and his death did not become known to her until after the 5th day of January, 1918. In the meantime she had made all payments as required by the contract of insurance, and on learning of the death of Benjamin F. Teed, she furnished proofs of death and demanded payment of the certificate of insurance in which she was named as beneficiary. The company refused to pay upon the ground that more than a year had elapsed after the death of the insured, and upon the further ground that she was not a legal beneficiary under the laws of this state. At that time they tendered back to Mrs. Teed the premiums and dues which she had paid after the death of Mr. Teed.

The first contention of the appellant is to the effect that the respondent had no insurable interest in the life of Benjamin F. Teed after the date of her divorce from him. A number of authorities are cited to that effect in the appellant's brief. This court has passed

upon that question in the case of *Humphrey v. Mutual Life Ins. Co.*, 86 Wash. 672, 151 Pac. 100. In that case we recognized the fact that the question was one upon which the authorities were not agreed, but we held, in accord with the apparent weight of authority, that, where a wife had an insurable interest at the time her husband assigned to her a policy of insurance upon his life, the existence of an insurable interest at the maturity of the policy is unnecessary, and her interest in the policy does not expire upon the procurement of a divorce. The ruling there is conclusive of the point in this case.

The main point, and the one upon which appellant apparently relies, is that, under the laws of this state, the respondent is not entitled to the benefits of this certificate because she is not related to the insured as required by the statute. The statute, by § 6059-211, Rem. Code, provides:

“The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree ascending or descending, father-in-law, mother-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member: . . . Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules, or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member: Provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes.”

This statute was passed in 1911. Laws of 1911, p. 279, § 211. It was not in effect when the policy in this case was issued, nor was it in effect when the respondent was made beneficiary in the certificate of insurance. No doubt, if this law had been in effect at that

time and the beneficiary in the certificate had not been married to the respondent, he could not have named her as a valid and legal beneficiary. But, at the time the respondent was named as beneficiary in the certificate, she was the wife of the insured. She was entitled under the law to be named as beneficiary. That status remained to her thereafter. *Humphrey v. Mutual Life Ins. Co., supra*.

So the question now is, Did the enactment of this law take away from the respondent her rights in this policy of insurance because it provides: "The payment of death benefits shall be confined to wife." We have held, and the rule is, that statutes will not be construed to operate retrospectively unless the intent that they shall do so is plainly expressed. *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381. We find nothing in this statute expressing such an intention. On the other hand, Rem. Code, § 6059-221, providing for the manner in which foreign corporations may be permitted to do business in this state, provides:

"That nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this state during the time such society was legally authorized to transact business herein."

We think it is apparent from this provision that it was not the intention of the legislature, in passing this act, to make it retroactive, or to nullify or change in any way any of the contracts theretofore made by fraternal insurance companies.

We are furthermore of the opinion that the appellant at this time is estopped from raising this question. The insured and the beneficiary named in the policy, after the divorce was granted, applied to the local officer who conducted the correspondence of the appellant and to whom the premiums and dues were

paid and forwarded, and this officer notified the parties that it was not necessary to change the beneficiary and advised them to keep on paying their premiums, which they did. The appellant accepted the premiums from that time down until after the death of the insured. We have held in the case of *Kennedy v. Supreme Tent of Knights of Maccabees*, 100 Wash. 36, 170 Pac. 371, that the secretary of a subordinate lodge, charged with the collection and remittance of dues, is such an agent that in the performance of his duties his mistakes could be chargeable as the act of the principal. It follows in this case that the appellant is estopped to say that the beneficiary here is not a legal beneficiary.

Some contention is also made by the appellant that the action was not brought within the time limited by the policy. The policy provides:

“No action can or shall be maintained on this certificate unless brought within one year of the date of death or disability of said member.”

The action was not brought within one year from the death of the member because his death was not known either to the beneficiary or to the insurer. The premiums and dues were regularly paid and the policy was kept alive and no default was made therein. This provision in the policy was plainly for the purpose of limiting the time when an action might be brought after a dispute arose after maturity of the policy. This provision, we think, does not cover a case where the insured dies and the death is not known either to the insurance company or to the beneficiary in the policy within the year, where the policy is kept alive by the regular payment of dues or premiums and the policy is not known to be matured. No authorities are cited in support of the appellant's position, and we are

June 1920]

Opinion Per TOLMAN, J.

of the opinion that this provision does not apply to the facts in this case. We find no error in the judgment, and it is therefore affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15816. Department Two. June 29, 1920.]

W. M. INGLIS, *Appellant*, v. A. G. MORTON, *Respondent*.¹

MALICIOUS PROSECUTION (3, 15)—PROBABLE CAUSE—EVIDENCE—SUFFICIENCY. Probable cause for instituting insanity proceedings must be found, as a matter of law, and is a complete defense to an action for malicious prosecution, where it is undisputed that defendant made a complete statement of all the facts, and made the complaint on the advice of a deputy prosecuting attorney; and objection to the evidence as general is unavailing where there was no effort to have it made specific.

SAME (13)—EVIDENCE—ADMISSIBILITY. In an action for malicious prosecution of an insanity charge, it is not error to exclude, on the issue of probable cause, the record in a civil case between the parties where it did not contradict defendant's evidence of probable cause or contain anything material to the issue.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 19, 1919, upon granting a nonsuit, dismissing an action for malicious prosecution. Affirmed.

P. L. Pendleton, for appellant.

Bates & Peterson and Remann & Gordon, for respondent.

TOLMAN, J. — Appellant, as plaintiff, brought this action against the respondent, as defendant, to recover damages for the alleged malicious prosecution of the appellant upon a charge of insanity. The complaint alleges that the respondent swore to a complaint upon

¹Reported in 190 Pac. 908.

an insanity charge, that the appellant was arrested thereunder, incarcerated in the county jail, thereafter tried on the insanity charge, and a verdict of "not insane" rendered by the jury. It is further charged that the respondent caused the warrant charging insanity to be issued maliciously and without probable cause for the purpose of procuring the plaintiff's commitment to an insane asylum, all because of a feeling engendered by former quarrels and litigation between the parties. The answer of the respondent admits the signing of the complaint charging the appellant with insanity; admits that the jury returned a verdict of "not insane" upon the hearing, and denies each and all of the other allegations of the complaint. At the close of appellant's testimony the trial court sustained a challenge to the legal sufficiency of the evidence and granted respondent's motion to discharge the jury and enter a judgment of dismissal, from which judgment this appeal is taken.

Both parties concede that a proceeding of this kind is analogous to a case where a party is charged with a crime out of which an action for malicious prosecution arises, and that the same rule should apply where the prosecuting witness makes a full, fair and complete statement to the prosecuting attorney, or to any other reputable attorney, and is advised that the facts are sufficient upon which to base a complaint of insanity. Since the parties are so agreed, and perceiving at this time no reason why their position is not correct, we have made no independent investigation to determine whether in other jurisdictions it has been so held, but assume for the purposes of this case that they are right.

This simplifies the issues to be here determined, and the only substantial question to be decided is: Did the undisputed facts, at the close of appellant's case below,

June 1920]

Opinion Per TOLMAN, J.

show that the respondent acted upon the advice of the prosecuting attorney, after making a full, fair, and truthful statement of all of the facts relating to probable cause existing for the charge of insanity? At the close of appellant's case, the undisputed evidence as brought out by the examination of the respondent, who was called as a witness by appellant, upon the question of probable cause, was that, on Saturday afternoon, May 25, 1918, while he was absent from his office, the appellant went to his place of business armed with a prospector's pick, and smashed up a glass show case belonging to respondent attached to the wall at the street entrance to his office, together with the exhibits therein; that, after so destroying the show case and its contents, appellant made a speech to the crowd which had assembled; that she was apprehended by a policeman and taken to the police station; that this situation was detailed to respondent when he returned to his office, and he then went to the police station to investigate further and was directed by the police officers to the prosecuting attorney for Pierce county. It being Saturday afternoon, the prosecutor's office was closed, and he then telephoned and went to the home of Mr. Gordon, one of the deputies, where he consulted with Mr. Gordon for something like an hour; that, in such consultation, he went minutely into details concerning all of his dealings and transactions with the appellant, including the history of the prior litigation between them, told him her history and the history of her troubles with other dentists of the city of Tacoma, and as he says: "I told him everything about it. He was familiar with some of the things about it because he had been at my office and asked about it. I told him everything. I kept nothing back. I put the whole matter up to the prosecuting attorney and followed his advice, and that is the reason I signed

the complaint." And on redirect examination, he further testified: "I told him about the damage suit. I went through as much of it as I remembered. Mr. Gordon was already familiar with it. I told him as fully the statement for Mrs. Inglis as I did for myself. I do not think I omitted anything. . . . I told him about all the trouble I had in the dentist chair that lead up to our disagreement."

After this conference with the prosecuting attorney on Saturday afternoon, respondent, according to his testimony, again went to the prosecuting attorney's office on Monday morning, further consulted with Mr. Gordon and with another deputy in the same office, and thereupon, acting wholly upon their advice and at their suggestion, he signed and swore to the insanity complaint. Appellant seems to complain that this was insufficient because respondent, in his testimony, did not disclose the exact words which he spoke to the prosecutor in making his statement to him, though it nowhere appears that there was any limitation placed upon the appellant's right by redirect examination to test the accuracy of witness' testimony and the fullness and fairness of his statement to the prosecutor by going into details and inquiring specifically as to what was said upon any and all points. We cannot hold this contention to be well founded. Appellant deliberately called the respondent to the witness stand and went into the question of his reasons and motives for signing the complaint, on direct examination, thereby opening the door for the cross-examination which followed, and on redirect examination he had full opportunity to test the witness' statements, both general and specific, and might have inquired in detail as to the disclosures made upon any and all points and the language used in making such disclosures. The evidence upon this point, as it stood at the close of ap-

June 1920]

Opinion Per TOLMAN, J.

pellant's case, was wholly undisputed, and therefore it became the duty of the court to pass upon that evidence and to find therefrom probable cause, as a matter of law, and to direct a verdict accordingly. *Borg v. Bringham*, 105 Wash. 521, 178 Pac. 450, and cases there cited.

Error is also assigned upon the refusal to admit in evidence the statement of facts in the civil case between the parties theretofore tried. Appellant does not advance any reason for the admission of this evidence, and from an examination of the record we perceive none. Appellant did not, in the examination of the respondent, direct his attention to such statement of facts, or anything therein contained, and our attention is directed to nothing therein which could in any wise contradict the respondent's testimony as to making a full, fair and complete statement to the prosecuting attorney.

Finding no error, the judgment appealed from is affirmed.

HOLCOMB, C. J., MOUNT, FULLERTON, and BRIDGES, JJ., concur.

[No. 15882. Department One. June 29, 1920.]

SKAGIT MILL COMPANY, *Appellant*, v. GREAT NORTHERN RAILWAY COMPANY, *Respondent*.¹

RAILROADS (13)—CONSTRUCTION OF SPUR TRACK—CONTRACTS—OVER PAYMENT. Notwithstanding Rem. Code, § 8628-13, requiring railroads to provide shippers with spur tracks at cost, when reasonably practicable, necessary, and safe, an agreement by a railroad to construct temporary spur tracks for a mill company at a certain price to be paid in advance, is binding as the voluntary contract of the mill company, which cannot recover the sums paid in excess of the cost, where it does not appear that the contract was not voluntary or the price agreed upon a fair bona fide estimate of the cost.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 13, 1919, upon sustaining a demurrer to the complaint, dismissing an action for money received. Affirmed.

E. C. Million, for appellant.

F. V. Brown, *Thomas Balmer*, and *A. J. Laughon*, for respondent.

MITCHELL, J.—This action was instituted to recover \$327.17 as money had and received by the defendant, alleged overpayment for the construction by the defendant of three spur tracks under agreement between the parties. Plaintiff has appealed from a judgment sustaining a general demurrer to the second amended complaint, and a dismissal of the action upon the refusal of the plaintiff to plead over.

The complaint alleges that, for ten years, the appellant had been the owner of and operating a sawmill on respondent's line of railroad, and made application to the respondent for the construction on the latter's

¹Reported in 190 Pac. 901.

June 1920]

Opinion Per MITCHELL, J.

property of side tracks or switch connections with its railway to enable the mill company to load logs it was cutting nearby on the railroad for shipment to the mill; that respondent required pay in advance and that appellant sign, as it did sign, a written contract which, among other things, provided that the appellant should pay in advance an amount stated as to each spur track as the agreed value of the material required (excepting ties), cost of labor, engineering and supervision, which were to be furnished by respondent; that the actual cost of putting in the three spur tracks was \$327.17 less than the contract price, which excess was so had and received by the respondent without consideration; and that its business necessities would not permit of delay, but compelled it to enter into the contract and make the payments provided therein.

It is appellant's contention that, notwithstanding its contract, it is entitled to recover the difference between the contract price and the actual cost of constructing the spur track, by virtue of the provisions of the public service commission law and the case of *State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Commission*, 77 Wash. 529, 137 Pac. 1057, Ann. Cas. 1915D 202, L. R. A. 1918B 786. Upon this subject, § 8626-13, Rem. Code, provides that a railroad company shall, upon the application of any shipper, provide upon its own property a side track and switch connection with its line of railway, whenever such a side track and switch connection is reasonably practicable and can be put in with safety, and the business therefor is sufficient to justify the same. Section 8626-62 of the code provides that, whenever the commission shall find, after a hearing had, that application has been made by any shipper for the installation of a side track upon the property of such railroad, that the same is reasonably practicable, can be put in

with reasonable safety, and the business therefor is sufficient to justify the same, and that the railroad company has refused to install the same, the commission shall enter an order requiring the construction of a spur track, provided the shipper so to be served shall pay the legitimate cost and expense of the construction as shall be determined in separate items by the commission, and before the railroad company shall be compelled to incur any cost in connection therewith, the same shall be secured to the railroad company in such manner as the commission shall require.

These two sections of the law were before this court in the case of *State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Commission, supra*. It was a case in which an appeal had been taken to the courts from the order made by the public service commission requiring the railroad company to construct a spur track. The principal questions presented by the railroad company in that case were (1) that a sufficient demand for the service had not been made by the shipper upon the railroad company and refused by it prior to complaint to the commission; (2) that the enforcement of the statute violated the due process of law clauses of the state and Federal constitutions; and (3) that the construction of the spur ordered would constitute an interference with interstate commerce, and hence the order was void. In resolving all three contentions against the railroad company, it was said a railroad company could be lawfully required, after a hearing on notice as to the reasonableness of the application, to build upon its own right of way, at the entire but least expense of the applicant, a spur track to provide the means indispensable to a participation in the public service, whenever such means do not unreasonably interfere with the general service or opera-

June 1920]

Opinion Per MITCHELL, J.

tion of the public utility, and whenever such means so provided are open to the use of the public on equal terms.

But we find nothing in that case or the statutes which authorizes the claim that the complaint here states a cause of action. It appears that the three spur tracks built, one after another, were only for the temporary use of the appellant. As between themselves, the parties may make a contract in such cases, and neither the policy of the law nor good morals is violated by the requirement of payment in advance. Manifestly the exact cost and expense of such construction could not be calculated beforehand, if at all, with mathematical certainty, and there is no allegation in the complaint that the respondent attempted to take any advantage of the appellant on account of the urgency of the mill business, or that it was aware of any urgency therein. For aught that appears in the complaint, the agreement was entirely voluntary. There is no allegation that the price agreed upon was not a fair and *bona fide* estimate of the cost and expense of each spur track at the time the agreement was made; it only being stated that it cost the respondent less to construct it, without alleging when the construction took place or that values continued the same. In view of possible changes from time to time in the market prices of labor and material, the difference between the alleged cost price and that agreed upon does not suggest fraud on the part of the respondent, and, indeed, none is charged. The contract conferred rights and imposed obligations upon both parties. It expressed the valuation agreed to by both parties. It was an executory contract, and, no doubt, had labor and material advanced in price before the construction was completed, respondent nevertheless could have

been held to the price fixed in the contract, and we are satisfied that the appellant was likewise bound.

Judgment affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MACKINTOSH, JJ.,
CONCUR.

[No. 15847. Department One. July 7, 1920.]

FRED J. PESHA, *Appellant*, v. WILLIAM H. PRATT,
Receiver etc., Respondent.¹

CORPORATIONS (73)—STOCKHOLDERS—SERVICES—CONTRACT FOR EMPLOYMENT. A written agreement by a corporation to employ a stockholder while he held the stock, the "stock and position transferable," fixing no time when the employment was to begin, does not show an intent to pay wages prior to the time fixed by an oral contract of the parties, where the primary purpose of the writing was to aid in the disposal of the stock.

Appeal by plaintiff from a judgment of the superior court for King county, Smith, J., entered February 25, 1920, in favor of the plaintiff, in an action to foreclose labor liens, tried to the court. Affirmed.

Channing M. Coleman, for appellant.

Thomas N. Swale and Wm. H. Pratt, for respondent.

MAIN, J.—The purpose of this action was to foreclose two labor lien claims. The plaintiff performed the labor covered by one of the claims, and the other claim had been assigned to him. The total amount of recovery sought was approximately \$900. The trial before the court without a jury resulted in a decree allowing \$35.32 and directing a foreclosure for this sum. The plaintiff, being dissatisfied with this award, prosecutes the appeal. The facts which gave rise to the controversy may be summarized as follows:

¹Reported in 191 Pac. 639.

July 1920]

Opinion Per MAIN, J.

During the month of October, 1918, W. A. Wilcox, Samuel C. Brown, and Fred J. Pesho organized the Wilcox Lumber and Logging Company, a corporation. Wilcox became the president and manager, Pesho the secretary and treasurer, and Brown the vice president. The capital stock of the company was \$40,000. Each of the parties put in \$1,000 in cash. In addition to this, Brown put in \$1,500 worth of sawmill machinery, and Wilcox \$14,000 worth of machinery. The purpose of organizing the corporation was to engage in the logging and sawmill business. The parties were first brought together by an advertisement by Brown, which Wilcox answered. Pesho was induced to invest through Brown. After the parties met and talked the matter over, they proceeded to organize the corporation and acquired the amount of stock specified. The balance of the capital stock was not subscribed. Soon after the organization of the corporation, the work of assembling the machinery and the construction of the mill began. At that time it was contemplated that it would take about ninety days to get the mill ready for operation. It developed that it would take a considerably longer time. Pesho, not being entirely satisfied with his investment and the way the construction of the plant was progressing, drew, in his own handwriting, on January 15, 1919, a memorandum and presented it to Wilcox as president of the company for signature, and it was thus signed. Brown added his name to the writing. This writing will be subsequently referred to. From the time the work of construction began, Brown and Pesho worked about the plant, which was completed and ready for operation on or about April 1, 1919. On the 22d of that month, the mill was destroyed by fire. It was operated from some time early in April until the time of its destruction, and Pesho and Brown continued to work therein.

The corporation being in an insolvent condition after the mill was destroyed, a receiver was appointed. Pesha and Brown each filed a notice of claim of lien. The question of fact is whether they were to draw wages from the time the construction work of the mill was entered upon or from the time it was completed and in operation. Upon this question, the testimony is conflicting. The appellant claims that they were to be allowed wages from the time they first began work, but that they were not to be paid until the mill was in operation. The respondent's contention is that the understanding between the parties was that no one of them should be allowed any compensation for any work done until the mill was completed and in operation.

Without reviewing the evidence in detail, it may be said that we think the holding of the trial court that it was the understanding of the parties that no wages should be allowed until the mill was completed and in operation must be sustained. After a careful consideration of the record, we are in entire accord with the views of the trial judge expressed orally at the conclusion of the case, as shown in the following excerpt from his opinion:

"I am well satisfied that Mr. Pesha and Mr. Brown originally started out with the intention of contributing without compensation their services until the mill was in operation, anticipating it would be for ninety days, and it lasted too long and they got tired of it. And when they finally wound up and the business collapsed, they got together and thought it would be a good plan to put in a claim for wages, which in my judgment they never anticipated getting when they started out. There is no showing that either party ever demanded wages, and they did not have their names in the books as employees. But when the mill was completed, then, in accordance with the understanding, their names went on the pay roll for a brief period, and they were entitled to wages."

July 1920]

Opinion Per MAIN, J.

It is claimed, however, that the writing above referred to indicates a contrary intention. It recites:

“Wilcox Logging & Lumber Co. does hereby agree to give F. J. Pesha steady work at not less than five dollars per day at said company’s mill, in consideration of said F. J. Pesha being a stockholder in said company, and to be employed for duration of said F. J. Pesha and holding stock in said Wilcox Logging & Lumber Co., said stock and position transferable.”

This memorandum, as already stated, was prepared by Pesha and signed Wilcox Logging & Lumber Company, by Wilcox and by Brown. Pesha, having become dissatisfied, was desirous of getting his money out of the corporation, and apparently conceived the idea that, if he had some memorandum showing that the stock and position were transferable, it would aid him in this respect. The memorandum was made approximately three months after Pesha and Brown began work on the construction of the mill, and yet contains no recital covering the matter of wages prior to that time. It fixes no time when the employment covered by it was to be begun, but recites that the employment was for the duration of the holding of the stock and that the stock and position were transferable. The reason for writing the memorandum and causing it to be signed, as stated by Pesha in his testimony, is as follows:

“I wrote the contract and took it to Mr. Wilcox and asked him to sign it and I asked him if that was all right. And when I presented it to him he said what is the idea. It is understood, he said, is it not, that you and Brown are going to get steady work? I said, yes, but in case I should want to dispose of my stock I would have a position to transfer with it.”

As we view the writing, it is not inconsistent with the view that wages were not to be paid until the mill was completed and in operation.

There is some argument in the briefs over the question of the burden of proof. This, however, is not very material in the present case. Under the issues made by pleadings, the burden was upon the appellant to establish all the elements of the action. If it be assumed, *arguendo*, that he did not carry this entire burden, the result would be the same.

The evidence amply sustains the holding of the trial court. The judgment will be affirmed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15834. Department Two. July 7, 1920.]

ALFRED HORNER, *Appellant*, v. PIERCE COUNTY,
Respondent.¹

COUNTIES (88)—STATUTES (86)—CONSTRUCTION—RETROACTIVE EFFECT—REMEDIES—CLAIMS AGAINST COUNTY. Laws of 1919, p. 414, requiring claims against counties to be filed within sixty days after the cause of action accrued, and prescribing the requisites of the notice of claim, is not retroactive and has no application to causes of action that accrued long prior to the taking effect of the act.

DEATH (16)—LIMITATION OF ACTIONS (40)—ACCRUAL—TORTS OF COUNTY—DEFECTIVE SIDEWALKS. A husband's cause of action against a county for damages for personal injuries to his wife, who died two and one-half years thereafter as a result of the injuries, accrued at the time of the injury and not at the time of her death.

COUNTIES (88)—STATUTES (86)—RETROACTIVE EFFECT—REMEDIES—CLAIMS AGAINST COUNTY. The last part of the proviso to Laws of 1919, p. 414, to the effect that no pending or future action against a county shall be defeated by the failure of a person to verify or file the claim if action be brought within three years, where a claim had heretofore been filed and rejected, does not show an intent to make the act retroactive and applicable to claims that accrued before the act took effect; but has application to the first part of the proviso relating to claimants who shall be incapacitated from verifying and filing their claims.

¹Reported in 191 Pac. 396.

July 1920]

Opinion Per BRIDGES, J.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered November 21, 1919, upon granting a nonsuit, dismissing an action in tort. Reversed.

George P. Fishburne, for appellant.

William D. Askren, J. A. Sorley, and Frank D. Nash, for respondent.

BRIDGES, J.—On November 15, 1916, Catherine Horner, the wife of the appellant, was injured through the alleged negligence of the respondent in failing to maintain a certain sidewalk in reasonable repair. On the 5th day of June, 1919, the appellant and his wife filed and presented to the board of county commissioners of respondent their claim for damages to Mrs. Horner in excess of \$10,000. Thereafter, and on June 16, 1919, Catherine Horner died, it is alleged, as the result of her injury. After her death, and on July 9, 1919, the appellant presented to the board of commissioners of the respondent his claim on account of the injury to his wife in the sum of \$3,415.40. These claims were disallowed. Thereafter, and in September, 1919, the appellant brought suit against respondent to recover damages, the suit being based on his claim filed with and presented to the county commissioners in the sum of \$3,415.40. At the trial of the case, the appellant sought to introduce in evidence the claim filed by him with the county commissioners. The respondent objected to the introduction of this claim for the reason that it did not comply with the statute of 1919 (Laws of 1919, p. 414) with reference to the presentation of claims to the county commissioners, and particularly because it failed to state the actual residence of the claimant at the time of presenting and filing the claim, and for a period of six months immediately prior to

the time the claim for damages accrued, as required by the 1919 statute. The trial court held the claim insufficient and entered a nonsuit against the plaintiff. From such judgment, the plaintiff has appealed. The chief question to be decided is whether the legislative act of 1919 concerning filing of claims controls.

Prior to June 11, 1919, the only statute with reference to the presentation of claims to county commissioners in cases of this character was § 3909, Rem. Code, which provided as follows:

“Nothing herein contained shall be so construed as to prevent a party having a claim against any county in this state from enforcing the collection thereof by civil action in any court of competent jurisdiction, after the same may have been presented and disallowed in whole or in part by the board of county commissioners of the proper county: *Provided*, That such action be brought within three months after such claim has been acted upon by such board.”

The 1919 legislature passed an entirely new act concerning the presentation of claims to county commissioners, as follows:

“All claims for damages against any county must be presented before the county commissioners of such county and filed with the clerk thereof within sixty days after the time when such claim for damages accrued. All such claims for damages must locate and describe the defect which caused the injury, describe the injury, and contain the amount of damages claimed, together with a statement of the actual residence of such claimant at the time of presenting and filing such claim and for a period of six months immediately prior to the time such claim for damages accrued, and be sworn to by the claimant. No action shall be maintained for any claim for damages until the same has been presented to the board of county commissioners and sixty days have elapsed after such presentation: *Provided*, That if the claimant shall be incapacitated from verifying and filing his claim for damages within

July 1920]

Opinion Per BRIDGES, J.

the time prescribed, or if the claimant be a minor, or in case the claim is for damages to real or personal property, and if the owner of such property is a non-resident of such county or is absent therefrom during the time within which a claim for damages to said property is required to be filed, then the claim may be verified and presented on behalf of said claimant by any relative or attorney or agent representing the injured person, or in case of damages to property, representing the owner thereof, and no action for damages now pending or hereafter brought shall be defeated by the failure of the person to verify or file the claim in person if action be brought within three years after the taking effect of this act where a claim has heretofore been verified and filed within the time and in compliance with the terms of this act if said claim has been rejected." Laws of 1919, p. 414.

This new enactment went into effect June 11, 1919. The appellant claims that, inasmuch as the injury for which the suit is brought occurred long prior to the going into effect of the 1919 statute, the statute in effect at the time of the injury controlled; but the respondent contends that the claim must have complied with the 1919 statute. The claim as presented to the board of county commissioners was amply sufficient under the old act, but failed in some respects to comply with the provisions of the new act.

"Retroactive statutes are generally regarded with disfavor, and where it does not clearly appear that such was the legislative intent, the court will not give a statute a retroactive effect where to do so would impair existing rights." *Bruenn v. North Yakima School Dist. No. 7*, 101 Wash. 374, 172 Pac. 569.

It is clear to us, the legislature did not intend that the 1919 act should be retroactive. It requires the claim to be filed within sixty days after the time the "claim for damages accrued." To have complied in this instance with its provisions, it would have been necessary to file the claim within sixty days after

November 15, 1916, the date of the injury, or more than two years and a half prior to the passage and going into effect of the act under which it is contended the claim should have been filed. Manifestly, the legislature did not mean to destroy entirely the appellant's right of action by imposing impossible conditions. But respondent contends that appellant's claim of damages did not "accrue" till the death of Mrs. Horner, and since she died after the new statute went into effect, that statute must control. We cannot subscribe to this argument. The appellant did not have a cause of action against respondent because of the death of his wife, but because of its alleged negligence. The negligence was the cause; the death was the result. Under the statute, the "claim for damages accrued," if at all, at the time of the injury to Mrs. Horner.

The first part of the proviso of the 1919 act was for the purpose of preserving causes of action to those who, for the reasons given, could not personally swear to their claims, as was required by the earlier provisions of the act. The proviso meant to preserve, rather than destroy—to excuse, rather than to compel—the performance of certain acts. The only portion of the act which tends to indicate that the legislature intended it should be retroactive is the last few words of the proviso reading as follows:

" . . . no action for damages now pending or hereafter brought shall be defeated by the failure of the person to verify or file the claim in person if action be brought within three years after the taking effect of this act, where a claim has heretofore been verified and filed within the time and in compliance with the terms of this act if such claim has been rejected." Laws of 1919, p. 414.

If the words just quoted are literally construed, they destroy the manifest purpose of the first portion of the proviso and are inconsistent therewith.

July 1920]

Opinion Per BRIDGES, J.

A history of the enactment as shown by our various statutes, however, will clearly show what the legislature had in mind. The 1909 legislative act, with reference to filing claims with cities of the second, third and fourth classes, provided that such claims should be filed with town councils within a certain period and that the same should describe the defect causing the injury, give the residence of the claimant, and be sworn to personally by the claimant. Vol. 2, Rem. & Bal. Code, § 7998. This act was amended in 1915 by adding thereto a proviso in almost the identical words found in the proviso of the 1919 act under consideration. Rem. Code, § 7998. In other words, the proviso of the 1919 act with reference to claims against counties was taken almost *verbatim* from the proviso of the 1915 law, which amended an existing act with reference to the presentation of claims to cities other than those of the first class. This proviso, as an amendment to the existing act with reference to cities other than those of the first class, makes the act entirely intelligible and shows that its purpose was to preserve certain rights which, but for the proviso, might have been defeated. When that proviso, however, is brought into a new act with reference to presenting claims to county commissioners, it is manifest that certain portions thereof do not fit with exactness into the act. In the light of this history, it seems plain to us that the legislature, by the proviso in the 1919 act, intended to preserve actions based upon claims which, for the reasons given in the proviso, could not be personally verified and presented by the claimant.

We are satisfied that the 1919 act was not intended to be, and is not, retroactive, and that the appellant was not required to comply with its provisions in filing his claim with the county commissioners. In holding

to the contrary the learned trial court was in error. The judgment is reversed and the cause remanded for trial.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15820. Department Two. July 7, 1920.]

FLORENCE BURNS (*formerly Florence Stolze*),
Appellant, v. IDA M. STOLZE, *Respondent*.¹

ACTIONS (31)—COMMENCEMENT—SERVICE OF SUMMONS WITHOUT FILING COMPLAINT—STATUTES. Failure to serve a summons within 90 days after filing the complaint, as provided by Rem. Code, § 321, does not lose the cause of action; and service of a summons thereafter is the commencement of a new action dating from the day of service.

PROCESS (25)—SERVICE BY PUBLICATION—AFFIDAVIT. Jurisdiction of a non-resident is not acquired by service of a summons by publication, where the affidavit for publication failed to state the existence of any of the grounds specified, as required by Rem. Code, § 228.

JUDGMENTS (156)—PROCESS (41)—COLLATERAL ATTACK—PRESUMPTIONS—RECITALS IN JUDGMENT. A recital in a default judgment of due service of summons, raises a presumption of jurisdiction notwithstanding a defective affidavit for publication shown by the record; but such presumption is overcome by an allegation and admission that the defendant was at all times a non-resident of the state and that the only service of process was by publication based upon the defective affidavit in the record.

APPEAL (375)—REVIEW—MATTERS NOT BEFORE TRIAL COURT. A jurisdictional objection to the validity of a judgment may be raised at any time, and will be decided by the supreme court although not pressed to the attention of the trial court.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 2, 1920, in favor of the defendant, in an action to vacate a judgment, tried to the court. Reversed.

¹Reported in 191 Pac. 642.

July 1920]

Opinion Per BRIDGES, J.

Guy E. Kelly and Thomas MacMahon, for appellant.
P. L. Pendleton, for respondent.

BRIDGES, J.—Prior to July 17, 1919, Ida M. Stolze, the respondent here, brought suit in the superior court of Pierce county, Washington, against Florence Stolze (now by marriage Florence Burns), the appellant here, to set aside a certain deed theretofore made to her, covering lots 1 to 8, inclusive, block 26, Cascade Park addition to the city of Tacoma, Washington, and to quiet title in her, Ida M. Stolze. Thereafter the court entered judgment by default in her favor against Florence Stolze, cancelling and annulling the deed mentioned and quieting title as prayed. This is an independent suit or proceeding in equity by Florence Burns to vacate and set aside the judgment so made.

In her petition to vacate she alleged, among other things, the commencement of the suit above mentioned and the entry of the judgment therein by default; that, during all the times mentioned, she was absent from the state of Washington and not a resident thereof; that there was in said original action a publication of summons against her, and that no service was ever made upon her except by publication of summons. The petition then proceeds to set out various excuses why she did not appear and defend. The respondent, Ida M. Stolze, answered this petition and, among other things, admitted the allegations to the effect that Florence Stolze was a nonresident of the state of Washington and during all of the times mentioned she was not therein, and that no service was had upon her in the original action other than by publication of summons. Later, the respondent demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action or to justify any relief, and at the time of serving and filing the

demurrer, she moved the court for permission to withdraw her answer for the purpose of interposing the demurrer. The record fails to show any order of the court permitting the withdrawal of the answer, or any order on the demurrer. The court proceeded to hear the case and take testimony upon the pleadings as indicated. After such trial and hearing, the court made a judgment denying the petition to vacate, from which Florence Burns has appealed.

The trial court was of the opinion that no sufficient excuse had been shown for failure to appear and defend the action, and in this conclusion we concur, if it be determined that appellant was properly brought into court.

The appellant, however, contends that the judgment was void because the court did not have any jurisdiction to enter it. This contention is based largely upon two grounds: first, because the summons was not served or published within ninety days after the filing of the complaint; second, because the affidavit for publication of summons was defective. The first objection cannot be sustained. *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049; *State ex rel. Teeter v. Superior Court*, 110 Wash. 255, 188 Pac. 391. The second ground for reversal is of a more serious nature. Section 228, Rem. Code, provides that, when the defendant cannot be found within the state, and upon affidavit being made and filed to the effect that the defendant is not a resident of the state or cannot be found therein, and that a copy of the summons had been mailed to him at his place of residence, if known, "and stating the existence of one of the cases hereinafter specified," the service of summons may be by publication thereof. The statute sets out seven instances where the service may be by publication. The affidavit in this case fails to state the existence of facts contained in any one of

July 1920]

Opinion Per BRIDGES, J.

the seven grounds, and for this reason it is contended that the court did not obtain jurisdiction.

In the case of *Felsing v. Quinn*, 62 Wash. 183, 113 Pac. 275, in discussing this identical question, we said:

“An attempted affidavit for service by publication which entirely omits allegations expressly required by the statute is without vitality or force, and when filed leaves the party, on whose behalf it is made, in no better position than if no affidavit had been filed. . . .

Where jurisdiction of a defendant depends upon service by publication, the making of the affidavit for publication, in strict compliance with the statute, is as essential to obtaining such jurisdiction as the publication of the summons itself, and an affidavit which does not contain all the statements specifically required by the statute is not sufficient to authorize publication of summons or confer jurisdiction.”

See, also, *Lutkens v. Young*, 63 Wash. 452, 115 Pac. 1038; *Pullman v. Pullman*, 92 Wash. 120, 158 Pac. 746.

Plainly, the affidavit in this instance did not comply with the statute and was insufficient to authorize a legal publication of summons. But the respondent attempts to meet this situation by showing that the judgment sought to be vacated recited the default of the defendant, appellant here, and “that the summons in said action was served on the defendant in the manner provided by law,” and contends that, under the previous decisions of this court, such a recital in the judgment is sufficient to show that the court obtained jurisdiction in some manner. This court has consistently held that recitals in a judgment that due and legal service of process had been made as provided by law will overcome any previous showing in the record of defective or insufficient service, and if one would overcome the presumption of jurisdiction resulting from such recitals, he must make some showing that the

only service on him was the defective service shown in the record.

In the case of *Nolan v. Arnot*, 36 Wash. 101, 78 Pac. 463, this court, discussing the question involved here, said:

“It has been the uniform holding of this court that the recitation in a judgment of jurisdictional facts, sufficient to give the court jurisdiction to pronounce the judgment, is proof of such jurisdiction.”

In the case of *Peterson v. Lara*, 46 Wash. 448, 90 Pac. 596, the identical question involved here was discussed and we there said:

“If it be conceded that the affidavit for service by publication was defective, and this is the only objection urged against the jurisdiction, yet the judgment recites that due service of process was made, and in such cases the presumption of jurisdiction is not overcome by any defects in the record.”

In the case of *Ballard v. Way*, 34 Wash. 116, 74 Pac. 1067, it was said:

“The judgment shows upon its face that the defendants had been served as required by law. In order to avoid the judgment, it devolved upon the respondent to show that no legal service was made, and that the court had no jurisdiction.”

The doctrine thus established has been followed by this court in a great many cases. It follows, therefore, that the judgment here is not necessarily void simply because the affidavit in the record, and upon which publication of summons was based, is fatally defective. But the testimony showed that appellant was at all times a nonresident of the state, and the petition for the vacation of the judgment alleged that, at all times, she was a nonresident of the state, and “that the complaint in said action was filed January 15, 1919, summons by publication commenced May 6, 1919, and no

July 1920]

Opinion Per BRIDGES, J.

service was made upon this defendant therein other than by said service of publication," and the answer to this petition admitted that allegation of the petition. We think that the petition and the answer thereto read together show conclusively that the only attempt to bring the petitioner into court in the original case was by virtue of the published summons, based upon the defective affidavit. It is true that, after this answer was filed and served, the respondent asked permission of the court to withdraw it for the purpose of interposing a demurrer, and that a demurrer was interposed; but the record does not show any disposition of the demurrer, but does show that the case proceeded to trial upon its merits by the taking of oral testimony. Manifestly, the demurrer was waived and the case was heard upon the petition and answer. In no event was the demurrer well taken, because it necessarily admitted the truth of the statement in the petition that no other service had been made except such as is shown in the files of the case. In addition to this, the certificate of the court to the statement of facts recites that the affidavit for publication found in the files was the "only affidavit for publication of summons on file in said cause and the affidavit upon which the judgment sought to be vacated rests." This condition of the record is sufficient to overcome the presumption of jurisdiction as a result of the judgment recitals. *Holly v. Monro*, 55 Wash. 311, 104 Pac. 508; *Hembree v. MacFarland*, 55 Wash. 605, 104 Pac. 837; *Bauer v. Widholm*, 49 Wash. 310, 95 Pac. 277; *Gould v. White*, 54 Wash. 394, 103 Pac. 460.

We do not find any merit in the respondent's motion to strike the briefs herein.

The record seems to indicate that the jurisdictional question which we have discussed was not pressed on the attention of the trial court. However, the question

is involved, and if the judgment is void it may be attacked at any time, and it is necessary that we determine the question, although it may not have been called particularly to the attention of the trial court.

The judgment of the lower court is reversed, and the cause is remanded with directions to the trial court to make a judgment vacating the default judgment in question.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15819. Department Two. July 7, 1920.]

IDA M. STOLZE, *Respondent*, v. FLORENCE STOLZE,
Appellant.¹

ELECTION OF REMEDIES (1, 6)—JUDGMENT (95)—VACATION—CONCURRENT REMEDIES. A motion in the original action to vacate a default judgment for want of jurisdiction, and an independent action in equity seeking the same relief, are concurrent remedies, and the election to exercise one forecloses the use of the other; and upon an adverse judgment, the only remedy is by appeal.

Appeal from an order of the superior court for Pierce county, Card, J., entered March 2, 1920, denying a motion to vacate a judgment, after a hearing before the court. Affirmed.

Guy E. Kelly and *Thomas MacMahon*, for appellant.

P. L. Pendleton, for respondent.

PER CURIAM. — The respondent commenced suit against the appellant in Pierce county, Washington, to set aside a certain deed which had previously been made to the appellant, involving lots 1 to 8, inclusive, block 26, Cascade Park addition to the city of Tacoma, Washington, and to quiet the title to such property in

¹Reported in 191 Pac. 641.

July 1920]

Opinion Per Curiam.

the respondent. There was a judgment by default, wherein the deed to appellant was cancelled and annulled and the title quieted in respondent. Thereafter the appellant, defendant below, commenced an independent action against the respondent here for the purpose of vacating and setting aside the judgment in this action. After a hearing in the independent action, the court entered an order refusing to vacate and set aside the judgment rendered on default. Thereafter the defendant here made and filed in this case her motion to vacate the judgment because the court had no jurisdiction to make it; her motion was based on the files of the case. The plaintiff answered the motion by setting up the above mentioned independent action to vacate the judgment. After a hearing, the court denied the motion to vacate, and from this order or judgment, the defendant appeals.

The object of the independent action and the motion herein were identical — to secure the vacation of the judgment rendered herein. Our statutes appear to afford two processes for seeking the vacation of a judgment; one by motion in the original action, and the other by an independent equitable suit. The remedies are concurrent and the exercise of the one forecloses the use of the other. In the case of *Boylan v. Bock*, 60 Wash. 423, 111 Pac. 454, we said:

“A person against whom a judgment is taken without jurisdiction may move against the judgment, or may prosecute an independent action to procure its vacation, but the two remedies are concurrent, and an adverse judgment in one proceeding is a bar to an action for similar relief under a different name or in a different form. This question has so often been decided by this court that it is no longer an open one.”

So in this case, the defendant, against whom the judgment ran, brought an independent action to vacate

the judgment. The judgment of the lower court was against her. She cannot now attempt to accomplish the same thing by motion in this case. Her sole remedy is an appeal from the adverse ruling in the independent action.

The judgment of the lower court is affirmed.

[No. 15853. Department Two. July 7, 1920.]

CHRIST LUCOPOULOS, *Appellant*, v. CHRIST
SOTRIOPOULOS *et al.*, *Respondents*.¹

PARTNERSHIP (6, 87)—EXECUTORY CONTRACTS—ACTION FOR ACCOUNTING. An action for an accounting for partnership profits must fail where there was merely an agreement to form a partnership which was never consummated because of the fault of one party or the other.

SPECIFIC PERFORMANCE (11-25)—CONTRACTS ENFORCEABLE—TO FORM PARTNERSHIP. Specific performance of a contract to form a partnership will not be decreed, except under special circumstances.

Appeal from a judgment of the superior court for King county, Wright, J., entered October 10, 1919, in favor of the defendants, in an action to enforce a partnership agreement and for an accounting, tried to the court. Affirmed.

Walter B. Allen, for appellant.

Philip Tworoger, for respondents.

FULLERTON, J.—In August, 1918, the respondents, as partners, owned and operated a restaurant in the city of Seattle, known as the Stadium Cafe. On the 27th day of that month, they entered into a contract with the appellant by which they agreed to sell him a one-fifth interest in the business for four hundred dollars and take him in as a partner. The business was then

¹Reported in 191 Pac. 149.

July 1920]

Opinion Per FULLERTON, J.

being conducted on leased premises under a month to month tenancy. The respondents were negotiating for a term lease, and it was a part of the agreement of purchase that it would not be consummated unless a term lease was obtained. Such a lease was afterwards obtained, and the appellant informed of the fact. As to the subsequent happenings, the evidence is in direct conflict. The appellant testifies that, after he obtained knowledge of the execution of the term lease, he tendered to the respondents the purchase price and that they, after various excuses and subterfuges, finally refused to carry out the agreement. It is the respondents' version that, after the appellant had been informed that the agreement was ready for consummation, he was unable to procure the purchase price, and sought to have them execute the agreement on his paying a part of the purchase price in money and giving his notes payable at future times for the remainder; that they refused to accede to this change in the agreement, and that, after repeated demands on the appellant to comply with the agreement as originally entered into and his failure to comply, they declared the deal off and refused to negotiate with him further.

In this suit the appellant seeks a decree of the court decreeing him to be a partner in the business and entitled to a one-fifth interest therein; decreeing further that an account be had of the partnership effects, that a receiver be appointed to take charge of the partnership business and property and sell the same, and that the proceeds of the sale be divided between the parties as their respective interests may appear.

The trial court held that the evidence was insufficient to establish a partnership relation and that the appellant was not entitled to the relief sought. With this holding we agree. Plainly, the contract between the parties did not in itself create the partnership relation,

but was an agreement to enter into a partnership relation at a future date. It is also plain that this agreement was never carried into effect. Whichsoever party was at fault, therefore, the relief sought cannot be granted, since the courts, except under certain special circumstances not present here, will not decree a specific performance of an agreement to enter into a partnership, but will relegate the injured party to the remedy of damages. But we think the evidence justifies the conclusion that the breach of the contract was on the part of the appellant rather than on the part of the respondents. Such being the case, the appellant is not entitled to relief in any form, and the trial court did not err in so holding.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 15817. Department Two. July 7, 1920.]

WILLIAM E. McLAREN, as *Executor etc.*, Respondent, v.
NARROWS LAND COMPANY, Appellant.¹

VENDOR AND PURCHASER (30)—CONTRACTS—CONSTRUCTION. Where a contract for the purchase of land on the installment plan is capable of more than one construction, that one will be adopted which is most favorable to the purchaser.

SAME (214)—ASSIGNEES OF CONTRACT—CONSTRUCTION—RIGHT TO REFUND. An assignment of a contract for the purchase of land with the written consent of the grantor, pursuant to terms of the agreement therefor, carries the whole contract, including the right to a return of the purchase money on death of the holder, notwithstanding the provision for refund was in the event of death while the contract "is in force and unassigned," where the contract did not make clear that the refund provision was to be unassignable.

SAME (214). In such case, the right of the legal representatives of the deceased assignee to the refund is not defeated by the fact that the refund was conditioned on the payment of all installments

¹Reported in 191 Pac. 389.

July 1920]

Opinion Per TOLMAN, J.

promptly on or before the date thereof, where the contract provided sixty days grace for the payments, and all payments were made and accepted without objection within the sixty day period.

CONTRACTS (71)—EVIDENCE (179)—PAROL EVIDENCE TO VARY WRITING—INTENT—CONSTRUCTION BY PARTIES. Upon an issue as to the construction of a contract for the sale of land, it is inadmissible to show by parol the construction placed upon the writing by the officers of the land company at the time the company prepared and adopted the printed forms for contracts.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 17, 1919, in favor of the plaintiff, after a trial to the court upon an agreed statement of facts, in an action on contract. Affirmed.

E. R. York, for appellant.

Flick & Paul, for respondent.

TOLMAN, J.—Respondent, as executor of the estate of Edith O. McLaren, deceased, brought this action in the court below to recover back the moneys paid on the purchase price of certain lots in Regent's Park, adjacent to the city of Tacoma, under a contract of purchase in writing, dated December 1, 1908, made by appellant, Narrows Land Company, a corporation, to and with Edith O. Wright and Orinda A. Lucas. The case was tried upon a stipulation as to the facts duly entered into between the parties, and from a judgment against it in the full amount prayed for, appellant prosecutes this appeal.

The facts being stipulated, the main question now to be determined is the proper construction to be placed upon certain terms of the written contract. The contract, among other things, provided that the purchase price of the property therein described should be the sum of \$2,000, payable \$100 in cash, on the execution thereof, "and the sum of fifteen (15) dollars on or before the 1st day of each and every month thereafter

until the entire sum of two thousand (2,000) dollars is paid." It further provides:

"No assignment of this contract or the premises herein described shall be valid unless the same be made with the written consent of the first party, . . .

"In the event that said parties of the second part shall make default in any of the payments hereinbefore provided for at the time the same become due and such default continues for sixty (60) days thereafter, then, and in that event, the party of the first part shall be relieved from all obligations under this agreement, and shall be under no obligation or liability to convey said real property, or any part thereof, and the money theretofore paid by said parties of the second part shall be retained by said party of the first part as a consideration for the execution of this agreement, and as a consideration for the right to the possession of said real property, which right of possession is hereby granted to said parties of the second part, to continue so long as the payments are made as provided in this contract.

"Time is hereby expressly declared to be of the essence of all the provisions of this agreement, and said agreement and all terms, conditions and covenants thereof, shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto. . . .

"In event of the death of the second parties while this agreement is in force and unassigned, the legal representatives of said second parties may continue payments thereon; or the first party will on request and on surrender of this agreement, provided payment of all installments herein agreed to be paid and then due, have been made promptly on or before the date thereof, pay to the legal representatives of the said second parties an amount equal to the sum of all monthly installments paid hereon, with interest at six per cent per annum, from date of payment on the amounts therefor paid from time to time."

Attached to the contract is an assignment by Orinda A. Lucas of her interest therein to her copur-

July 1920]

Opinion Per **TOLMAN, J.**

chaser, Edith O. Wright, dated July 20, 1909, and countersigned by the Narrows Land Company, and the written stipulation of Edith O. Wright that she will make all payments and be bound by all of the terms of the contract.

In addition to the initial payment of \$100, the purchasers named in the contract made various payments of installments from time to time until July 20, 1909, when the assignment was executed and accepted by the land company; and thereafter Edith O. Wright, then having married, under the name of Edith O. McLaren, continued to make the payments until her death on December 1, 1917. At the time of the death of Mrs. McLaren, all payments then due under the terms of the contract had been paid, but of the 108 monthly installments which had matured prior to her death, only seventeen were paid promptly on or before the due date described in the contract, and the remaining ninety-one installments were, according to the schedule attached to the contract, and stipulated to be correct, paid at various intervals after the date on which each matured, but always within the sixty-day period and before a default might have been claimed, and were accepted and receipted for by the land company as and when made. After the death of Mrs. McLaren, the respondent duly qualified as executor of her estate and made demand for the payment to him of the amounts paid upon the contract, plus interest, according to the refunding condition above quoted.

Appellant strenuously contends that no recovery should have been permitted because (1) the death of both of the purchasers named in the contract did not occur; (2) the agreement was to pay only to the legal representatives of "said second parties," and not to one of them; (3) the contract was not "unassigned" within the meaning of the refunding provision; and

(4) respondent's testatrix had not complied with the condition precedent, in that all of the installments which matured prior to her death had not been paid promptly on or before the due dates fixed by the contract.

It is a familiar rule that such a contract as this must be considered as a whole, so that effect may be given to every part, and if any provision is susceptible of more than one construction, that construction will be adopted which is most favorable to the purchaser. In other words, it will be construed against the grantor.

Considering together the first three points raised by appellant, and bearing in mind this elementary rule of construction, it would seem obvious that, when the grantor provided for the assignment of the contract with its consent, an assignment so made would carry with it the whole contract and all rights thereunder, including the right to a return of the purchase money under the terms of the refunding provision. And after giving its written consent to such an assignment and accepting payments thereunder from the assignee, the land company may not now be heard to say that its consent was but partial or conditional. It had an opportunity, both in the drafting of the contract and in consenting to the assignment, to make clear and plain that the refunding provision should in no event be assignable, and that no assignment of the contract, even though assented to, should extend the refunding privilege to any but the original purchaser. Not having done so before the assignee parted with her money in reliance upon its consent to the assignment, it is now estopped.

We think that the contention that recovery may not be had because all payments were not made on or before the due date, is equally without merit. Admitting that the purpose of the refunding provision was in

July 1920]

Opinion Per TOLMAN, J.

part to secure prompt payment of the installments, still the contract itself provides sixty days of grace before default can be claimed, and a payment within that period is a prompt payment within the meaning of the contract. As was said by Judge Rudkin in construing a similar contract in *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125:

"On the second question presented we are of opinion that the court was fully warranted in finding or concluding that payments made within the sixty days allowed by the contract of sale were promptly made within the agreement to refund.

"The two contracts related to the same subject-matter, were a part of the same transaction, and if the purchaser was not in default under the one he was not in default under the other. The appellant accepted the respondent's money without objection and the objection now interposed to its return does not strongly appeal to us."

It is true that there is some language used in the case of *Boyle v. Narrows Land Co.*, 70 Wash. 59, 126 Pac. 78, which seems inconsistent with that just quoted, but the decision in the *Boyle* case does not rest upon such inconsistency and we are not bound thereby. The *Boyle* case does hold, in construing a contract identical with this:

"The contract, in effect, stipulated that repayment should be made only on condition that 'payment of all installments herein to be paid and then due have been made promptly on or before the date thereof.' The expressions 'then due' and 'the date thereof' relate to the date of the death of the vendee. The plain reading of this provision of the contract is that the right to repayment should exist at the date of the vendee's death, on the sole condition that all payments then due had been promptly made."

A holding with which we are now content.

Appellant further contends that the trial court erred in not admitting parol testimony to show the construction placed upon the written contract by the officers of the land company when they adopted and had prepared the printed form. Clearly their interpretation of its meaning would not be binding upon the courts, and therefore the offered evidence was immaterial and inadmissible for any purpose.

Finding no error, the judgment appealed from is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15771. Department One. July 7, 1920.]

**JULIUS SCHMELLING, *Appellant*, v. AUGUST HOFFMAN
et al., *Respondents*.¹**

JUDGMENT (142-1, 163)—VACATING—PROCEEDINGS—DIRECT OR COLLATERAL ATTACK. In an action brought against the former owner, to quiet title to property acquired by a commissioner's deed under a default judgment in a former suit, a cross-complaint attacking the validity of the deed and default judgment on the ground of fraud in resorting to publication of the summons, is a direct and not a collateral attack on the judgment, and therefore sustainable, notwithstanding the cross-complaint was denominated an affirmative defense.

PLEADING (27)—THEORY AND FORM—TITLE TO PLEADING. The title given to a pleading is immaterial, and if the facts set up in an affirmative defense entitled defendant to relief, it will be treated as a cross-complaint.

PROCESS (42, 43)—EVIDENCE TO IMPEACH RETURN—FRAUD—SUFFICIENCY OF EVIDENCE. There is sufficient evidence of fraud in making an affidavit for publication of a summons under Rem. Code, § 228, stating that the defendant cannot be found (of which the sheriff's return is *prima facie* evidence), where it appears that the defendant was a resident of the city, engaged in business as a painting contractor, with his name in the official city directory and in the city telephone directory for years, and that plaintiffs had

¹Reported in 191 Pac. 618.

July 1920]

Opinion Per MITCHELL, J.

made payments to his agent who was also still residing in the city; and in such case the sheriff's return of "not found" is insufficient to justify the service, since there must be an effort in good faith to find him.

Appeal from a judgment of the superior court for King county, Smith, J., entered October 18, 1919, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

Russell & Blinn (J. W. Russell, of counsel), for appellant.

Dan Earle, for respondents.

MITCHELL, J.—In 1913, Laura Atwood and husband owned the real property involved in this action. They entered into a written contract with one L. V. Baker for the sale of the lots, which are situated in Seattle, Washington. Thereafter Baker assigned his rights under the contract to the plaintiff. In January, 1914, Mrs. Atwood and her husband sold the property to William Hoffman, subject to the Baker contract. In 1917, the plaintiff, claiming he had fully paid up on his contract and failing to get a deed, brought an action against William Hoffman and wife to acquire title to the property. In that action, upon service by publication of summons, there was no appearance by the defendants, there was judgment for the plaintiff, and a commissioner appointed by the court conveyed the property to plaintiff on October 14, 1917. By a deed dated August 14, 1918 (recorded August 19, 1918), William Hoffman and wife conveyed the property to the defendant August Hoffman. Thereafter, July, 1919, the present suit was brought by plaintiff to quiet his title to the property against the claims of defendants August Hoffman and wife. The complaint was in the usual form in such cases.

In their answer the defendants allege, in substance, that they are the owners of the real property by virtue of the deed to them from William Hoffman and wife; that the judgment obtained by the plaintiff in the former suit against William Hoffman and wife, and the commissioner's deed issued thereunder, were procured by fraud of the plaintiff, in that the affidavit of plaintiff therein for the publication of summons alleged that those defendants were nonresidents of the state and could not be found therein; although, during all the years from 1913 to 1919, said William Hoffman and wife were continuous residents of Seattle; that he was engaged therein as a painting contractor, their names were to be found in the official city directory, in the telephone directory of the city, and his residence was well known to his agent in Seattle, to whom the plaintiff had made certain payments for William Hoffman on the real estate contract; that none of the defendants in either suit knew anything about the former suit until about the time of the commencement of the present action; and that plaintiff has never completed the payments on his real estate contract, but that the balance due thereon is in dispute and can be determined only by an accounting. The answer contained the prayer that the former judgment and commissioner's deed be cancelled and that an accounting be had. The allegations of the answer were denied by a reply. Upon the trial, findings and conclusions were made sustaining the charges in the answer, and a judgment was entered cancelling the deed made by the commissioner appointed in the first suit and directing an accounting to be had. The plaintiff has appealed.

It is contended by appellant that the trial court erred in permitting the defendants in this action to attack the judgment in the former one, on the score that

July 1920]

Opinion Per MITCHELL, J.

it is a collateral attack upon the judgment of a court of record having jurisdiction of the subject-matter of the action. The attack, however, in the present case is direct. Respondents specifically attack the regularity and validity of the judgment in the former suit upon the ground of fraud on the part of plaintiff in the taking of steps necessary under the statute to resort to the publication of summons against the defendants therein. We are satisfied that, where an action is brought against the former owner or his grantee to quiet the title to property acquired by the deed of a commissioner appointed by the court in a former suit wherein there was no appearance on the part of the defendant therein, a cross-complaint by such former owner or his grantee, attacking the validity of that former judgment and commissioner's deed, constitutes a direct and not a collateral attack.

Appellant's apparent confusion as to the character of the attack in this case seems to proceed largely from the fact that the portion of the answer constituting the attack is designated an affirmative defense rather than a cross-complaint. But, under our code procedure, if the facts set forth in a pleading entitle one to relief, it is wholly immaterial by what name the pleading is called, especially in those cases where, as here, the facts alleged were denied by a reply and no complaint as to the designation of the answer was made unless and until evidence was offered, and even then appellant only objected unless the attack on the judgment in the former action was by reason of the fact either that a return of "not found" was not made therein or that no affidavit by the plaintiff, or any one in his behalf, that defendant therein was not a resident of the state and could not be found within the state had been filed. The objection went not to the form or

designation of pleading, but only to the introduction of evidence tending to show the fraud alleged.

That the title given to a pleading is immaterial has been repeatedly held by this court. *Smith v. Driscoll*, 94 Wash. 441, 162 Pac. 572; *Lawrence v. Halverson*, 41 Wash. 534, 83 Pac. 889; *Casey v. Oakes*, 17 Wash. 409, 50 Pac. 53. As applied to an answer, the rule is tersely stated in the case of *Brown v. Massey* (Okla.), 92 Pac. 246, as follows:

“If the facts pleaded are sufficient to authorize the granting of affirmative relief, and the affirmative relief is prayed for by the answer, then it is the duty of the court to treat it as a cross-petition, regardless of what the pleader may call it.”

On the other branch of the case, § 228, Rem. Code, provides:

“When the defendant cannot be found within the state (of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county is *prima facie* evidence), and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, . . . and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons”

The method of acquiring jurisdiction by the publication of summons is in derogation of the common law, and the well established rule requires that all the statutory requirements be accurately taken in order to confer upon the court jurisdiction over the defendant, although the subject-matter of the action is within the power of the court. By the statute, above quoted, there is no authority to publish summons without the filing of an affidavit of the plaintiff, his agent or at-

July 1920]

Opinion Per MITCHELL, J.

torney, stating that he believes the defendant is not a resident of the state or cannot be found therein. In the suit against William Hoffman and wife, the affidavit filed was made by the plaintiff and appears regular upon its face. Among other things, it says:

"That he believes that the defendants William Hoffman and Emelie Hoffman, his wife, are not residents of the state of Washington and that they cannot be found therein; that the place of residence of the said William Hoffman and Emelie Hoffman are unknown to this plaintiff."

It is the absence of good faith on the part of the plaintiff in making such statements that constitutes the grounds for the attack on that judgment and convinced the trial court of the fraud alleged.

The appellant was not acquainted with William Hoffman or his wife. However, the evidence in the case abundantly justifies the findings made by the trial court. It shows that, during all the years from 1913 down to the commencement of the present suit, William Hoffman and wife were openly and notoriously residents of Seattle; that said William Hoffman, in his own name and with several of his sons, was engaged in business in Seattle as a painting contractor; that, during those years, the official city directory of Seattle gave the names of Hoffman and wife, and that their names or the name of some member of the family were to be found in the city telephone directory during all those years; and that, at the date of the affidavit for the publication of summons, the agents of William Hoffman and wife, to whom payments made by plaintiff on the real estate contract were delivered, were still residing and doing business in Seattle. Appellant admitted that, at and before making the affidavit for publication of the summons in that case, the only thing he did to learn the whereabouts of William Hoffman and

wife was to have his attorney in that case (who did not testify in the present case) report that William Hoffman and wife could not be found at an address suggested by a sub-agent who acted for the collection agents of the Hoffmans. Under the facts in this case, it is difficult to understand how the sheriff by his deputy could have rather promptly made a return of "not found," unless, as suggested by counsel for respondents, it was purely perfunctory. The situation here shows the wisdom of the statute requiring something more than the return of "not found" by the sheriff, and yet, if all the available, reliable and easily accessible sources of information to be had at the date of the affidavit by the plaintiff in the former suit, as to the residence of William Hoffman and wife, may be wholly ignored, then the right to resort to constructive service of process by publication, based as it is on the ground of necessity, may be readily made a weapon to practically deprive a resident defendant of the sacred right of having his day in court. It is not necessary that all conceivable means should be used, but an honest and reasonable effort should be made to find the defendant prior to substituted service of process.

We are satisfied the spirit and intent of the statute were not complied with in the making of the affidavit upon which the publication of summons was had in the former case; that there was no jurisdiction of the defendants acquired in that case, and that the court properly set aside and cancelled the commissioner's deed issued in pursuance of the judgment therein.

The judgment in this case is entirely just and equitable under the circumstances in providing for an accounting between the parties; whereupon, if it shall be found appellant has made full payments on his real estate contract, he will be entitled to the land, other-

July 1920]

Statement of Case.

wise he will be compelled to pay the balance due or forfeit his rights in accordance with the terms of the contract.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MACKINTOSH, JJ.,
concur.

[No. 15895. Department One. July 8, 1920.]

THOMAS S. BURLEY *et al.*, Respondents, v. HURLEY-
MASON COMPANY, Appellant.¹

BAILMENT (3)—CARE AND USE—NEGLIGENCE OF BAILEE—LIABILITY. A bailee of a scow for the mutual benefit of the parties is not liable as an insurer for damages that the scow may sustain, but only for failure to exercise ordinary care.

SAME (3)—PRESUMPTIONS. There is a presumption of negligence on the part of a bailee where the property was delivered to him in good condition and returned damaged, casting upon him the burden of showing ordinary care.

SAME (8)—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. There is sufficient evidence that a scow was delivered to a bailee in good condition, where it appears that it would have capsized when loaded, if its bottom had been in the condition it was in when returned.

SAME (8). The presumption of negligence by a bailee from the fact that a scow, received in good condition, was returned with a damaged bottom, is not overcome, where the injury indicated that it had rested upon a hump on the beach where it had been moored.

DAMAGES (50)—MEASURE—EXPENSES INCURRED. The reasonable value of expenses incurred are sufficiently shown by evidence that towing charges were made at the rate fixed by the public service commission, and that other items expended were the reasonable value thereof.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 23, 1920, upon findings in favor of the plaintiffs, in an action

¹Reported in 191 Pac. 630.

for damages to property in possession of a bailee, tried to the court. Affirmed.

Stiles & Latcham, for appellant.

Remann & Gordon, for respondents.

MAIN, J.—The purpose of this action was to recover damages to a scow. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law and judgment sustaining the plaintiffs' right to recover. From this judgment, the defendant appeals. The essential facts may be summarized as follows:

The respondents are copartners doing business under the firm name of Tacoma Tug & Barge Company. The appellant is a corporation organized under the laws of this state. The appellant was constructing a concrete base for a pavilion at Point Defiance, on the shore of Puget Sound, in the city of Tacoma. On or about the 27th day of June, 1919, the respondents delivered at or near the pavilion a barge loaded with sand and gravel. This barge remained in possession of the appellant for approximately three weeks. From time to time it was caused to be moved by the appellant from one location to another to accommodate its convenience in getting the sand and gravel from the scow and using it in the construction work. When the scow was redelivered to the respondents, its bottom at one place near one of the corners thereof was in such a damaged condition that it leaked badly. The boards were splintered, as though that point of the scow had rested upon some hard surface while the remaining portion of the scow was afloat. When the scow was first delivered, the captain of the tug boat refused to moor it in a place indicated by the superintendent of the works because he did not know the

July 1920]

Opinion Per MAIN, J.

nature of the bottom at that place. The parties admit that the relation created by the delivery of the scow was that of bailment for their mutual benefit.

Before taking up the consideration of the questions of fact, two rules of law should be stated, the first of which is that the appellant did not become liable as an insurer for any damage that the scow might sustain while in its possession, but only for the failure to exercise ordinary care. *Thompson v. Seattle Park Co.*, 94 Wash. 539, 162 Pac. 994. The other rule is that, in cases where property is delivered to the bailee in good condition and returned damaged, a presumption arises of negligence on the part of the bailee and casts upon him the burden of showing the exercise of ordinary care. *Patterson v. Wenatchee Canning Co.*, 53 Wash. 155, 101 Pac. 721; *Kingsley v. Standard Lumber Co.*, 84 Wash. 189, 146 Pac. 369.

With these rules of law in mind, attention will now be given to the questions of fact presented by the appeal. It is first claimed that there is no showing that the scow was in good condition at the time it was delivered. The trial court, on this question, found that it was in "good repair and condition." While the direct evidence upon the matter was general, it is amply sufficient, when supported by other circumstantial evidence, to sustain the finding. The captain of the tug boat which towed the scow to its first mooring testified that it was in good condition then. The evidence further shows that, had it been in the leaky condition that it was at the time it was redelivered by the appellant, it could not have been towed while loaded, because it would have capsized. To establish that the bottom of the scow was in good condition at the time of the delivery, when it was drawing approximately seven feet of water, it was not necessary that some

one should have gone beneath it and examined its condition.

It is also claimed that the court failed to find, and the evidence failed to show, that the appellant did not exercise ordinary care to protect the scow from damage while it was in its possession. The court specifically found that it was in good condition at the time of delivery, and that, when redelivered, it was in a "leaky and bad condition with the bottom planks sprung and broken," and in one of the conclusions recited that the "damage was caused wholly by the carelessness and negligence of the defendant." Under the rule of law second above stated, the fact that the scow was delivered in good condition and redelivered in bad condition would raise a presumption of negligence and cast upon the appellant the burden of showing that it had exercised ordinary care. The character of the injury sustained by the scow was such as to indicate that the injured portion had rested upon a knob or hump, while the balance of the scow was afloat. There was evidence that, at one point where it was caused to be moored by the appellant, there was a hump on the beach upon which the scow would rest when the tide receded. The trial court was right in its conclusion that the presumption arising from the fact of injury was not overcome by the evidence.

Finally, it is claimed that the items of damage were charged at arbitrary rates without regard to the reasonable value. One of the items complained of was towing charges which the respondents were required to pay on account of the damaged condition of the scow. The evidence shows that these charges were made at a rate fixed by the public service commission. The other items complained of are supported by evi-

July 1920]

Opinion Per TOLMAN, J.

dence that the amount expended for each item was the reasonable value thereof. The proof, therefore, meets the requirement of the rule stated in *Torgeson v. Hanford*, 79 Wash. 56, 139 Pac. 648.

The judgment will be affirmed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15723. Department Two. July 8, 1920.]

SAMUEL KNECHT, *Respondent*, v. WALTER SIMS,
Appellant.¹

ANIMALS (18)—DAMAGE TO CROPS—EVIDENCE—SUFFICIENCY. A verdict for \$75 for damages to a wheat crop by trespassing hogs is not unsupported, where there was conflicting evidence as to whether the crop was of any value for harvesting, and there was a counterclaim for hogs taken up and converted.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered April 30, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

G. E. Lovell, for appellant.

TOLMAN, J.—This action was commenced by respondent, as plaintiff below, to recover from appellant, as defendant, for damages caused to his crop of wheat by stock belonging to appellant. The complaint alleges that the respondent was the owner of a crop of wheat grown on a certain 160 acres of land; that appellant was the owner of about 100 head of swine, which he wrongfully permitted to run at large, and that these animals ate and destroyed plaintiff's entire 160-acre crop, to his damage in the sum of \$1,500. The answer admits that a small number of appellant's

¹Reported in 191 Pac. 399.

swine ran upon and destroyed respondent's grain, and pleads affirmatively that the loss of the wheat crop was settled and fully paid for by the payment of the sum of \$20, which was accepted as such settlement by the respondent, and a counterclaim is pleaded to the effect that respondent took up and converted to his own use eight head of appellant's hogs of the value of \$30 each, or a total of \$240. The reply admits the payment of \$20, but pleads that it was paid in settlement of the damages done to the same crop on another occasion by appellant's horses, and that it had no relation whatever to the damage caused by the hogs.

The case was tried to a jury, which rendered its verdict in favor of respondent for \$75, and from a judgment on the verdict, this appeal was taken.

The only error assigned is that the trial court erred in refusing to grant a new trial on the ground that the verdict was contrary to the evidence.

Respondent has favored us with no brief, but we have read the entire record and find evidence which would sustain a larger verdict. Indeed, appellant's whole argument here is that respondent's evidence, if believed by the jury, would have warranted a larger verdict; while appellant's evidence was to the effect that the crop was of no value whatever, and no verdict could have been rendered against him had the jury believed it. Hence his conclusion that there was no evidence to support the verdict that was rendered.

In speaking of a like contention in a case where it was argued that the verdict was in an impossible sum under the issues there presented, Mr. Justice Chadwick, speaking for this court, said:

"But we do not understand that a verdict will be set aside as within the rule of mistake or compromise or that it is impossible under the theory of either

July 1920]

Opinion Per TOLMAN, J.

party, unless it shows upon its face that the jury has given way to passion or prejudice, or has acted in willful disregard of its duty to consider the testimony, and a true verdict render." *Haeefele v. Brackett*, 95 Wash. 625, 164 Pac. 244.

So here, there is nothing to indicate that the jury willfully disregarded its duty in any respect. The evidence of respondent and his witnesses as modified by cross-examination, and interpreted in the light of the condition of the crop as shown by all of the evidence, presented a case peculiarly for the jury, and whatever the verdict, we should be disinclined to disturb it. But with the counterclaim a factor, as it was under the evidence, and our inability to say whether the jury allowed anything thereon, or, if so, how much; the \$20 admittedly paid, to be considered if found not to have been paid in settlement of the damage caused by the hogs; the uncertainty as to the amount harvested by the respondent; the wide range of testimony as to the probable yield, running from nothing to some seven bushels per acre; and the testimony drawn from one of appellant's witnesses that the crop, while worthless for harvesting, was worth \$200 for pasturage; it is clearly evident that the verdict as rendered might be the only verdict which the jury could render from the evidence as believed by it. In any event, we cannot say that appellant has any cause for complaint.

The judgment appealed from is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15796. Department Two. July 8, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. J. BERG,
Appellant.¹

CRIMINAL LAW (60-4)—APPEAL FROM JUSTICE COURT—DILIGENCE—DISMISSAL. It is the duty of defendant appealing from a conviction in justice court to diligently prosecute his appeal, which will be dismissed on motion of the state where the justice's transcript was not filed for nearly six months, and nothing had been done to have it filed within a reasonable time.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered January 17, 1920, dismissing an appeal from a conviction in a justice court, for a want of diligence. Affirmed.

J. W. A. Nichols and *Browder Brown*, for appellant.

William D. Askren, *Thomas F. Ray*, and *J. W. Selden*, for respondent.

BRIDGES, J.—On July 23, 1919, the appellant was found guilty of a criminal charge made against him, before a justice of the peace in Tacoma, Washington. On the same day he gave oral notice of appeal to the superior court of Pierce county, and at the same time gave a bond conditioned that he would duly prosecute his appeal and abide by and perform the judgment of the superior court. The transcript on appeal was filed in the superior court January 13, 1920. On the next day, the state made and served its motion for dismissal on the ground that the appeal had not been prosecuted within a reasonable time. Thereafter the superior court made an order dismissing the appeal. From that order and judgment, the defendant has appealed here.

¹Reported in 191 Pac. 400.

July 1920]

Opinion Per BRIDGES, J.

Section 1919, Rem. Code, provides that an appeal to the superior court in a case such as this may be taken within ten days after the judgment or sentence, and the appellant shall be committed to the county jail unless he shall give bond to be approved by the justice of the peace, conditioned that he will appear in the court appealed to and prosecute his appeal and abide the sentence of the court. Section 1920 provides that an appellant in a criminal action shall not be required to advance any fees in claiming his appeal or in prosecuting the same, and that, if the defendant shall fail to enter and prosecute the appeal, he shall be defaulted on his bond. Section 1921 makes it the duty of the justice of the peace, on notice of appeal being given, to make and certify a copy of the conviction and other proceedings in the case and transmit the same to the clerk of the court appealed to. In this case the notice of appeal was given July 23, 1919, and the transcript was not filed with the clerk of the superior court till January 13, 1920, nearly six months after notice of appeal was given.

The statute manifestly contemplates that an appeal and the prosecution thereof from a criminal conviction shall be taken and had with reasonable dispatch. The appeal is initiated by the defendant and for his own benefit. It is his duty to make a reasonable effort not only to get his appeal perfected, but to prosecute it after it is once fully in the superior court. In this case the delay was caused by the justice of the peace failing, for a period of about six months, to send to the superior court a transcript of his records. Doubtless the delay was the result of an oversight on the part of the justice, but the record fails to show any effort on the part of the appellant to get the record filed. While it is true that, under the statute, he is

not required to pay to the justice any fees for the transcript, that alone will not excuse him from such a long delay. If he had looked after his appeal as the spirit of the statute contemplates, he would have known that the transcript had not been filed within a reasonable time. Having such knowledge, he was bound to take some action—he was, at least, bound to call the matter to the attention of the justice of the peace and request that officer to send in the transcript. He will not be permitted to initiate the appeal and then complacently wait until someone else acts.

In the case of *State v. Parmeter*, 49 Wash. 435, 95 Pac. 1012, this court, speaking of the duty of the defendant in prosecuting his appeal from the justice's court, said:

“He was entitled to trial in the superior court only by reason of his appeal if diligently prosecuted. Failure upon his part to so prosecute the same would authorize the superior court to award sentence against him without further trial, in like manner as if he had there been convicted.”

In the case of *State v. Jones*, 80 Wash. 335, 141 Pac. 700, this court, speaking with reference to a similar appeal, said:

“It must be remembered that the appellant himself was obligated to prosecute the appeal. If he failed to do so with reasonable diligence, the appeal was subject to dismissal on the part of the state, leaving him subject to punishment under the judgment of conviction, pronounced against him by the justice's court.”

In the case of *State v. Buffum*, 94 Wash. 25, 161 Pac. 832, this court said:

“Since the burden of prosecuting the appeal is on the defendant and not the state, it must follow that the state is entitled to a dismissal when a reasonable time elapses after the appeal is taken and no effort is

July 1920]

Opinion Per BRIDGES, J.

made on the part of the appellant to prosecute it to a final conclusion."

It is true that, in the cases from which we have quoted, the delay occurred after the transcript had been filed in the superior court; but there is no greater duty devolving upon the defendant to diligently prosecute his appeal after it has reached the superior court than that imposed upon him in the perfecting of his appeal. We think the superior court was entirely justified in dismissing the appeal for want of diligent prosecution.

The appellant further argues that the criminal complaint did not state any crime under the statute. This question is not before this court. The appeal is here from the order of the lower court dismissing the appeal from the justice's court, and the correctness of that decision is the only matter before us.

The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15654. Department Two. July 8, 1920.]

VIOLET M. KELLY *et al.*, Respondents, v. WILL H.
MERRITT *et al.*, Appellants.¹

FRAUD (6, 22)—RELIANCE ON REPRESENTATIONS—EVIDENCE—SUFFICIENCY. The purchasers of an apartment house lease are entitled to rely on representations of real estate brokers that a purchaser of the apartment house on sheriff's sale, assuming to be the owner of the premises and consenting to an assignment of the lease, was the owner and had agreed to renew the lease, and may recover for fraud upon proof that the representations were false.

EVIDENCE (204)—EXPERT TESTIMONY—VALUE OF APARTMENT HOUSE LEASE. The testimony of a real estate man experienced for many years in buying and selling apartment house leases in the same city, that a lease is worth fifteen months' profit, is competent upon an issue as to the amount of damages from loss of the purchase of a lease through fraud.

FRAUD (23)—DAMAGES—MEASURE. The measure of damages for fraud resulting in the loss of the purchase of an apartment house lease is the difference between the value of the apartment as it was, and what it would have been if the lease could have been procured.

Appeal from a judgment of the superior court for King county, Smith, J., entered June 9, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for fraud. Affirmed.

Winter S. Martin and *A. C. Hough*, for appellants.

Ballinger & Hutson, for respondents.

MOUNT, J.—This action was brought to recover damages against the defendants on account of alleged false and fraudulent representations in the sale of an apartment house. Upon issues joined, the case was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiffs for \$1,500. The defendants have appealed.

¹Reported in 191 Pac. 404.

July 1920]

Opinion Per MOUNT, J.

A large number of errors are assigned, but the principal points argued by the appellants are that the court erred in refusing to grant a nonsuit at the close of the plaintiffs' evidence, and in refusing to grant a judgment notwithstanding the verdict at the close of all the evidence. The appellants vigorously contend in this court that the rule of *caveat emptor* should apply, and because it was within the power of the plaintiffs to learn all of the facts, and because they did not do so, they cannot now recover for false representations, even if made.

Since the case was tried to a jury and a verdict returned in favor of the plaintiffs, we must assume, for the purpose of this appeal, that the facts as stated by the appellants are true. These facts are in substance as follows: In March, 1918, the respondents were desirous of purchasing a lease running from three to five years on an apartment house. They applied to the appellants, who were acting as real estate brokers in the city of Seattle, and were introduced to a Mr. Arnold, who was then in the employ of the appellants. Mr. Arnold showed the respondents several apartment houses which were not suitable. He also showed to the respondents an apartment house known as the "Oleta." He stated to the respondents that this apartment house had a short time lease, but that the owner of the house would make a new lease of from three to five years at an advanced rental. The lease in effect at that time expired in September, 1918, and carried a monthly rental of \$350. Mr. Arnold stated that the owner had been seen and that a three to five year lease could be procured upon this apartment at about \$500 per month after the expiration of the short term lease. He advised respondents to take an assignment of the short term lease and in that way save \$150

per month for the time of the short term lease, and thus saving about \$900. This was satisfactory, and the respondents thereupon agreed to pay \$5,500 for the furniture and the lease upon this apartment house, which was to be extended for a period of from three to five years after the expiration of the lease then in effect. The lease then upon this apartment house was owned by one Bellingham, who had possession of the house. He had listed this lease and furniture for sale at \$5,500. There was a mortgage upon the furniture for \$2,500. It was agreed that the respondents should assume that mortgage and pay the balance, \$3,000, in money and notes. A mortgage upon the apartment house which had been given by the owner of the fee had been foreclosed and the apartment house had been purchased by Ivan L. Hyland. The time for redemption had not yet expired. Respondents did not know these facts and were not informed thereof.

At the time the respondents agreed to purchase the lease, Mr. Arnold, who represented the appellants, stated to them that he had seen the owner of the property and the owner had agreed to extend the lease from three to five years at an additional rental after the expiration of the lease then in force. When requested by the respondents to see the owner and interview him, Mr. Arnold stated that they could see the owner when the final papers were prepared. Thereafter Mr. Merritt, one of the appellants, stated to the respondents, in substance, that he was an attorney at law and that he would see that their interests were protected if they desired him to do so. On March 20, respondents were told that Mr. Hyland was the owner of the premises and that he had consented to a renewal of the original lease from three to five years and that they would go to his office and the papers

July 1920]

Opinion Per MOUNT, J.

would there be made out. Thereupon Mr. Bellingham, who held the short term lease, and the respondents, with an attorney selected by appellants, and Mr. Arnold went to the office of Mr. Hyland. Mr. Bellingham, Mr. Arnold and the attorney who represented the respondents, went into Mr. Hyland's private office. The respondents waited in the outer office. After a conference of a few minutes, Mr. Arnold returned to the outer office and informed the respondents that the owner had agreed to extend the lease for a period of three to five years at a *little less* than \$500 per month. Thereupon Mr. Hyland dictated an assignment of the short time lease from Bellingham to the respondents. Mr. Hyland consented to the assignment in writing and the respondents agreed to accept the assignment of the lease. The consent by Mr. Hyland reads as follows:

"The undersigned, Ivan L. Hyland, purchaser at sheriff's sale of the above described premises under mortgage foreclosure against Huldia E. Johnston, do hereby consent to the foregoing assignment.

"Dated this 23d day of March, 1918.

"Ivan L. Hyland."

The respondents went into possession of the building, and at the expiration of the short term lease in October, 1918, were ousted by Mrs. Johnston, who had redeemed from the foreclosure and refused to extend the lease.

Under the facts testified to by the respondents, as stated above, we are satisfied there was no duty on the part of the respondents to inquire further whether Mr. Hyland was actually owner of the property or whether he would consent to a renewal of the lease. According to the respondents' testimony, the appellants had sent an attorney along with the respondents, and this attorney was supposed to look out for the

interests of the respondents on the assignment of the short term lease. When Mr. Arnold had stated that Mr. Hyland was the owner of the property and that he consented to an assignment of the short term lease and to an extension thereafter of three to five years at less than \$500 per month, it stands to reason, we think, that they had a right to rely upon that representation. It is argued here that the consent to the assignment signed by Mr. Hyland was itself notice of the fact that he was not the owner of the premises. It may be that one versed in the law might conclude that a purchaser at sheriff's sale was not the absolute owner of property so purchased, but it is plain, we think, that an ordinary person, not knowing perhaps of the right of redemption in another person, would conclude that Mr. Hyland, the purchaser, was the actual owner. The attorney selected by the appellants to represent respondents upon that occasion did not advise respondents that Hyland was not the lawful owner of the premises at that time. In any event, we are satisfied that the respondents were entitled to rely upon the statements made by Mr. Arnold to them upon that occasion, and that the rule of *caveat emptor* should not apply under those facts. When the appellants, through their employee, Mr. Arnold, represented to the respondents that Mr. Hyland was the owner of the premises and that he would consent to a renewal of the short term lease from three to five years, we think the respondents were under no obligation to make further inquiry. *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183. In *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585, in discussing the question of whether the vendee may rely upon the representations of his vendor, it is said:

“Ordinary prudence does not require a person to test the truthfulness of representations made to him

July 1920]

Opinion Per MOUNT, J.

by another as of his own knowledge with the intent that they shall be believed and acted upon, even though the party to whom such representations are made may have an opportunity to ascertain the truth for himself."

See, also, *Eyers v. Burbank Co.*, 97 Wash. 220, 166 Pac. 656.

When these respondents were taken into the office of Mr. Hyland, they were informed that he was the owner of the apartment house. They clearly had a right to rely upon that information. According to their testimony, an attorney to represent them was sent along by the appellants. There was no statement and nothing said to lead the respondents to understand that Mr. Hyland was not the absolute owner, authorized not only to consent to the assignment of the short term lease, but authorized also to make a renewal lease at the expiration of the short term lease. The respondents were told in Mr. Hyland's office that he had consented to make a renewal lease. Mr. Hyland had made no such promise. We are of the opinion that the respondents had a right to rely upon representations made with reference to the renewal of the lease, and when they were dispossessed at the expiration of the short term lease, had a right to recover damages against the appellants, who were responsible for the false representations. The trial court, therefore, did not err in refusing to grant the nonsuit or in refusing to grant a judgment notwithstanding the verdict.

Appellants assign error upon the refusal of the court to give certain requested instructions. No argument is made thereon except to say that their refusal was error and that the same points are not covered by the court in his instructions. We have examined the instructions given by the court. They are full and

clearly present the questions submitted to the jury and, we think, cover the whole case. It is therefore unnecessary to review these requested instructions.

Appellants also argue that the court erred in refusing to strike the testimony of a witness who testified in substance that a lease upon an apartment house is worth fifteen months' profit. The witness, if we understand him correctly, was attempting to testify that it would take fifteen months' profit of the business of an apartment house to pay for the lease. This witness was an experienced real estate man engaged for many years in buying and selling leases on apartment houses in Seattle. We are of the opinion that his evidence was entitled to consideration upon the question of damages recoverable in a case of this kind. At any rate, it was evidence that the jury might reasonably consider in determining the amount of damages. The court very properly instructed the jury that the measure of the damage was the difference between the value of the apartment as it actually was and what it would have been if the lease could have been procured for three years at \$500 per month.

We find no merit in any assignments of error. The judgment is therefore affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

July 1920]

Opinion Per MACKINTOSH, J.

[No. 15748. Department One. July 8, 1920.]

F. L. MINNICK, *Appellant*, v. ARTHUR KITT *et al.*,
Respondents.¹

BILLS AND NOTES (138)—WEIGHT AND SUFFICIENCY OF EVIDENCE—FRAUD. Affirmative defenses, to actions upon notes given in payment for a machine, are sustained where it appears that the sale was induced by false representations, and that later there was a readjustment of the matter whereby plaintiffs agreed to cancel the notes and accept payment for the machine from a corporation to be organized.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered July 11, 1919, upon findings in favor of the defendants, in an action on promissory notes, tried to the court. Affirmed.

Cordiner & Cordiner, for appellant.

Carl Ultes and *Dodds & Dodds*, for respondents.

MACKINTOSH, J.—This is an action to recover on three promissory notes executed by the respondent and payable to appellant. The answer admits the execution of the notes and that they are unpaid, but excuses the nonpayment by two affirmative defenses; the first being that the notes were executed in payment for a gold separating machine owned by the appellant which he sold to respondents upon representations as to its value and efficiency, which representations were false; and second, that, subsequent to the sale, the appellant and respondents entered into an agreement whereby the notes were to be cancelled and the machine was to be delivered to a corporation which was then being organized, which was to take and pay for the machine.

¹Reported in 191 Pac. 398.

The trial court, hearing the evidence, determined that it sustained the allegations of the affirmative defenses, and rendered judgment for the respondent.

A reading of the one hundred and twenty-five pages of statement of facts discloses that the evidence does not preponderate against the findings of the trial court, and, in truth, the evidence convinces us that no other decision could reasonably have been arrived at. The testimony shows that the representations as to the value of the machine were false; that the representations as to the amount of work it was capable of accomplishing were also false; and, upon the second point, the testimony is convincing that, after the sale of the machine to the respondents, a readjustment of the transaction was made, whereby the appellant agreed to cancel the notes upon which the suit is brought and to deliver the machine to the mining company and accept payment therefor from the company.

Being satisfied that the trial court arrived at the proper conclusion upon the evidence, its judgment will be affirmed.

HOLCOMB, C. J., MITCHELL, PARKER, and MAIN, JJ., concur.

July 1920]

Opinion Per MACKINTOSH, J.

[No. 15837. Department One. July 8, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v.
O. Z. SKINNER, *Appellant*.¹

CRIMINAL LAW (347-1)—NEW TRIAL—JURORS READING NEWSPAPER ARTICLES. Where accused voluntarily consented to the separation of the jury, he can not ask a new trial on the ground that during the recesses the jurors read newspaper articles on the matter involved, in the absence of a positive showing that the reading of the articles resulted in the returning of verdict not upon the evidence, but as a result of passion and prejudice from the articles read.

SAME (312)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS. In a prosecution for embezzlement, a hypothetical instruction to the effect that, if certain things were true, certain other things were necessarily true, is not so prejudicial as to warrant a new trial, where the court's interpretation of the defendant's version of the transaction was correct and the jury were instructed that he could not be found guilty even if he committed a breach of faith.

SAME (442)—APPEAL—REVIEW—VERDICTS. A verdict of guilty on conflicting evidence cannot be set aside where there was sufficient evidence to justify the verdict and to do so would interfere with the jury's prerogative of measuring the credibility of the witnesses.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered June 16, 1919, upon a trial and conviction of grand larceny. Affirmed.

Cary M. Rader, Elihu F. Barker, and Sharpstein, Smith & Sharpstein, for appellant.

Earl W. Benson and A. J. Gillis, for respondent.

MACKINTOSH, J.—Appellant was convicted of the crime of grand larceny by embezzlement, and on this appeal urges that the conviction should be set aside for three reasons:

First, that the jury, during the trial, read certain newspaper articles which contained references to the matter involved in the criminal case, and also re-

¹Reported in 191 Pac. 148.

ferred to a judgment which the prosecuting witness had recovered against the appellant in a civil proceeding involving the same state of facts. These newspaper articles were not read in the jury room, but were read by the jurors at their homes during recesses in the trial, and from the record we cannot say that from these they were prejudiced. The defendant voluntarily consented to the separation of the jury during the trial, and must be held to have anticipated that, during such recesses, the jurors would follow the general habit of reading current news, and if there were news articles with reference to the controversy between the prosecuting witness and the defendant, that, in all human probability, such articles would be read by some or all of the jurors. In the absence of a positive showing that the reading of these articles resulted in a verdict being returned, not upon the evidence in the case, but as a result of passion and prejudice aroused by what the jurors had read, the appellant must abide the consequences of his voluntary act in allowing the jurors to come into possession of such articles.

Second, the next claim is that the court, in an instruction to the jury, commented upon the facts to the prejudice of appellant. The important question in the case was whether the money which it was alleged the appellant had embezzled was received by him as agent for the prosecuting witness, or had been received by him from the prosecuting witness as a payment upon the sale of property, and became thereby the property of the bank, which was the owner of the property. The court informed the jury that, if the money was paid on the purchase price, the appellant would have no right to agree with the prosecuting witness to

“get Cook out of the deal, for if Skinner was the agent of the bank, it would have been a breach of faith on his part to thus agree with Cook, but if Cook did

July 1920]

Opinion Per MACKINTOSH, J.

agree with Skinner that Skinner should keep the money if Skinner should assist him to get out of the deal, and if Skinner did so conduct the matter that Cook was gotten out of the deal, and if Skinner then claimed the money in good faith, as against Cook, you could not find the defendant guilty."

The point raised by the appellant is that in this instruction the court passed upon the facts and instructed the jury that he was guilty of a breach of faith, even if his contentions were correct that the bank was the owner of the money. It appears to us that, taking appellant's version of the transaction as true, the court was correct in his interpretation of it and that the instruction was not prejudicial, for the reason that the court instructed the jury that the defendant could not be found guilty even though he had committed a breach of faith with the bank. Furthermore, the instruction is not a positive statement by the court of any fact, but merely is a statement that, if certain things are true, certain other things are also necessarily true. This hypothetical instruction is not of such a prejudicial nature as to warrant a new trial.

The third and most important question in the case is whether there was sufficient evidence to go to the jury to show defendant was acting as the agent of the prosecuting witness at the time of receiving and withholding the money. Abundant evidence was introduced in behalf of appellant which might justify the jury in finding he was not such agent. A view of the testimony, however, discloses that there was evidence to the contrary from which the jury was entitled to arrive at the verdict returned by it. It is not for us to weigh the evidence upon this appeal, nor would the lower court have been justified in taking the case away from the jury upon its weighing the testimony. As long as there was sufficient evidence to justify the ver-

dict, the court will not interfere with the jury's prerogative of weighing the testimony and measuring the credibility of the witnesses from whom it is produced.

We find no error in the record, and the judgment is affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ., concur.

[No. 15759. Department One. July 8, 1920.]

JESSIE McELRATH, *Respondent*, v. EMMA FALL *et al.*,
Appellants.¹

APPEAL (386)—REVIEW—ESTOPPEL TO ALLEGE ERROR—ACCEPTING REDUCED VERDICT. Plaintiff having accepted a remission in the amount of a verdict to avoid a new trial, cannot, on defendant's appeal, urge that the judgment be in the amount of the original verdict.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered June 7, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Evans & Watson, for appellants.

Sharpstein, Smith & Sharpstein, for respondent.

PER CURIAM.—Respondent recovered a verdict for \$5,134.25, as compensation for personal injuries received by her when she was struck by an automobile owned by appellant. On motion for a new trial, the court reduced this verdict to \$3,000, giving the respondent the alternative of remitting to that amount or submitting to a new trial. Respondent filed the remission.

The appellant's only point upon this appeal is that the verdict as it now stands is still excessive, being arrived at through passion and prejudice. An examination of the record does not justify this court in inter-

¹Reported in 191 Pac. 398.

July 1920]

Syllabus.

fering with the verdict as finally approved by the trial judge.

The respondent suggests that she should be allowed the amount awarded by the jury. Having voluntarily agreed to the remission fixed by the trial court, she is now in no position to urge that the amount of the original verdict be taken as the amount of the final judgment.

Judgment affirmed.

[No. 15574. *En Banc*. July 8, 1920.]

HURLEY-MASON COMPANY, *Respondent*, v. PACIFIC
COMMISSARY COMPANY, *Appellant*, E. G. LINDBERG,
Intervener and Appellant.¹

PLEADING (30)—COMPLAINT—DUPLICITY. A complaint in an action on an account stated is not duplicitious from the statement of facts not inconsistent, constituting a cause of action without reference to the account, upon which plaintiff may recover, although the account stated was not proven.

APPEAL (389)—REVIEW—AMENDMENTS REGARDED AS MADE. In an action tried de novo on appeal, the supreme court must regard a complaint upon an account stated to have been amended to conform to proofs showing plaintiff entitled to recover upon another ground without reference to the account.

CORPORATIONS (214)—ASSIGNMENT FOR CREDITORS—AUTHORITY OF OFFICERS AFTER ASSIGNMENT. After a corporation has become insolvent and made an assignment for the benefit of creditors, its secretary is without any authority to bind it by making a new contract with a creditor agreeing to pay an account and amounting to an account stated.

EVIDENCE (95)—ADMISSIONS—BY CORPORATE OFFICER. After a corporation has become insolvent and made an assignment for the benefit of creditors, a letter written by the secretary of the corporation agreeing to pay a claim is not admissible as independent evidence of a declaration or admission by the corporation that the claim was a just obligation.

ACCOUNT, ACTION ON (3)—EVIDENCE. The statement of an account by a government field officer who was keeping the account by

¹Reported in 191 Pac. 624.

agreement as agent for both parties is prima facie evidence, as between the parties, of the correctness of the account, although he was not sworn as to its correctness.

SAME. The statement of an account by an auditor acting for both parties, showing items of merchandise not paid for, is not impeached by the evidence of an officer of one of the companies that all items of merchandise taken from the commissary and applied to its private use had been paid for, where information as to the state of the account was derived wholly from the auditor, and it could not be known that the payments were in full.

CONTRACTS (11)—REQUISITES—IMPLIED CONTRACTS—REPUDIATION OF GOVERNMENT CONTRACT. Where the government had a direct interest in an agreement between a construction company and a commissary company for the messing of officers at a military post, and agreed to reimburse the construction company for its expenditures in giving the commissary company free use of facilities, there could be no implied contract on the part of the commissary company to pay for such use, should the government repudiate its promise and charge the cost to the construction company or refuse to allow the cost thereof in its settlement with the construction company.

CONTRACT (131, 151)—OPERATION AND EFFECT—PERFORMANCE OR BREACH—ACTS CONSTITUTING BREACH. A promise by a construction company to present in its own name, when its own claims had been adjusted, a claim of its subcontractor, a commissary company, against the government, does not relieve the subcontractor of its obligation to the construction company; nor is the same breached until its own claims were adjusted.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 6, 1919, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Reversed in part.

Stiles & Latcham, for respondent.

Peters & Powell, for appellant Pacific Commissary Company.

Donworth, Todd & Higgins and *W. E. Froude*, for appellant Lindberg.

FULLERTON, J.—In June, 1917, the respondent, Hurley-Mason Company, entered into a contract with the government of the United States for the construc-

July 1920]

Opinion Per FULLERTON, J.

tion of the buildings and other utilities the government desired to have constructed at the site of the army post in Pierce county, afterwards known as Camp Lewis. By the terms of its contract, the construction company obligated itself to establish a commissary at the site of the construction work for the purpose of supplying meals and lodgings to such of its employees as might desire the service. No rate of charge was fixed by the contract for the service to be furnished the employees, although the contract provided that the revenue derived from the commissary and the utilities connected therewith should be applied in reduction of the cost of its operation; the government agreeing to reimburse the construction company for its net expenditures incurred in such operation. The contract further provided that the title to all completed work and all work in the course of construction should be in the United States. It also provided that all subcontracts should be in accordance with the agreement between the government and the construction company, and that all such contracts should have the approval of the contracting officer of the government.

On July 10, 1917, the construction company, with the approval of the constructing quartermaster of the post, sublet the work of conducting the commissary to the appellant Pacific Commissary Company. By the terms of the contract, the commissary company agreed to buy all of the provisions and supplies necessary to be used in the work, prepare and serve meals to the construction company's employees, and to do the janitor work connected with the lodging places. The construction company, on its part, agreed to pay the costs of the provisions and supplies, and, as a consideration to the commissary company for its services, agreed to pay it for each meal served, prices ranging from one and

one-half cents to two cents per meal, owing to the number of meals served each day.

This contract, like the one between the construction company and the government, made no provision for charging the construction company's employees with the meals supplied them. Such a charge, however, was made, and the sums collected thereon were turned over to the construction company, or credited to its account. The charge made was thirty cents per meal, which was afterwards found to be less than the actual cost by fifteen cents per meal.

The government had on the grounds at all times an accounting officer, denominated a "field auditor." To prevent "duplication of forces," this officer took charge of the accounting between the construction company and the commissary company. He established a commissary warehouse in which all supplies purchased for the use of the commissary were received and from which they were disbursed as required for the immediate uses of the commissary company. The construction company seemed to have no connection therewith other than the duty of paying the bills. The method of operation, as described by the bookkeeper of the construction company, was substantially this: As a particular commodity became low in the warehouse, a request for an additional supply would be made by the commissary company on the field auditor. If he approved of the purchase, he would make out a requisition and send it to a purchasing agent. This agent would make the purchase and cause the commodity purchased to be shipped to the warehouse, where it would be examined as to quality and checked with the requisition. If found correct in these respects an order would be sent to the construction company authorizing payment. That company would thereupon send its check to the seller of the commodity for the amount of the purchase.

July 1920]

Opinion Per FULLERTON, J.

In August, 1917, the government ordered some fourteen hundred line officers to report at Camp Lewis for duty. Notice of their coming was given the commander of the post on the day before the day they were due to arrive. Officers of this character are required by the government to provide for their own subsistence, but, as it is well known locally, Camp Lewis is several miles distant from any point where such subsistence could be procured from independent sources, and no arrangement had been made by the government by which such subsistence could be procured at the camp. In this emergency, the camp officer in charge called upon the commissary company and requested it to provide for messing the officers, assuring it that it could use for that purpose the facilities provided for messing the construction company's employees. The commissary company undertook the work, and a rate per day to be charged the officers was agreed upon between the officer and the company. The company arranged for messing the officers in buildings apart from those used in messing the construction company employees, and while it procured the supplies used in the messes from the general warehouse from which all the supplies were taken, separate accounts were kept thereof by the field auditor. The construction company did not learn of the arrangement until some two weeks after it was consummated, the attention of its officers being then attracted to it by the rapid rise in the supply account. Protest was then made against the arrangement by its officers, who were quieted by the assurance on the part of the camp officers of the government that the government would protect them against loss. The commissary company also, acting under the permit given it by its contract, opened and conducted several stores at the site of the post, and also opened and conducted a public restaurant thereat. In these it had a number

of employees, who took their meals at the mess houses conducted for the use of the construction company's employees. The business of providing messes for the officers, and the business of conducting and operating the stores, was wholly the private business of the commissary company, the construction company having no interest therein or anything to do therewith.

These conditions continued until some time in December, 1917, when the construction company completed its contract with the government. The field auditor at that time cast the accounts relating to the commissary between the construction company and the government. He found that the gross loss to the construction company in the operation of the commissary had been \$130,260.74. Of this sum he conceived that \$7,768.08, which the construction company had paid, represented items properly chargeable to the commissary company because of the independent businesses conducted by it, and disallowed the same, leaving a net balance due from the government to the construction company of \$122,492.66.

From the first statement of the account submitted by the auditor it is impossible (for us at least) to gather the items that make up the total of the amount disallowed. In part the items were the following:

| | |
|--|----------|
| Construction work on buildings..... | \$623.24 |
| Overhead on expense account (proportion)... | 2,517.80 |
| Overhead on salaries account (proportion)... | 4,906.82 |
| Meals to employees of commissary company.. | 1,400.85 |
| Salaries | 600.00 |

The item deducted for construction work was the cost paid by the construction company for labor and material used in fitting certain buildings (constructed for other purposes) with shelves, counters and other fixtures for use by the commissary company as stores. The items for overhead were a one-fourth part of the

July 1920]

Opinion Per FULLERTON, J.

total expenses paid by the contracting company for general services rendered the commissary company, and a one-fourth part of the salaries paid employees in the conduct of the commissary department. The item for meals was the auditor's estimate of the number of meals served to the employees of the commissary company who were employed in the conduct of its independent business. These were charged for at the rate of forty-five cents a meal, the average cost of the meals to the government. The item under the head "Salaries" was made up from salaries paid the officers of the commissary company, which the auditor conceived were not payable under the contract between the construction company and the commissary company; at any rate, not properly chargeable to the government.

From the total of the disallowances, certain fees for the service of meals were deducted, leaving the balance as stated.

A copy of the account was given the commissary company, whereupon its officers protested against the charges. It was then made the subject of further inquiry by the department at Washington and the account was recast. On the recast the finals remained the same, but there was a material change in the items making up the deductions. In the account as finally approved, the items were listed as follows:

| | |
|--------------------------------------|------------|
| Merchandise | \$1,801.50 |
| Proportion of overhead expense..... | 1,876.31 |
| Proportion of overhead salaries..... | 4,419.34 |
| Meals to employees..... | 1,400.85 |
| Truck services | 118.50 |
| Repairs to buildings..... | 623.34 |

| | |
|----------------------------------|-------------|
| Making a total of..... | \$10,239.84 |
| From this was deducted fees..... | 2,467.65 |

Leaving a net balance of..... \$7,772.19

This total, it will be observed, is \$4.11 more than the total actually deducted. The bookkeeper of the construction company explained that this difference was probably the result of a transposition made when totaling the numerous items making up the account, which it was found more convenient to ignore than to run down. The item "truck services" was included in the "overhead expense" item in the original cast. No explanation was given to account for the remaining differences between the amounts of the "overhead" charges in the two statements, or for the omission from the latter of the salary item included in the first; these differences, however, were absorbed in part by the item in the recast account labeled "merchandise," and in part by the allowance made for fees. This recast account, so the officers of the commissary company testify, was never submitted to them.

In this action the construction company seeks to recover from the commissary company the amount of the disallowances made by the government auditor. In its complaint it set forth its contract with the government, its subcontract with the commissary company, and alleged in substance that the commissary company used the privileges accorded by the subcontract in the carrying on of businesses for its own benefit and emolument, other than the business provided for in its contract, causing the bills incurred in the operation of such businesses to be presented to and paid by it, along with other bills covered by the terms of the agreement between them, thereby becoming indebted to it in the sum of ten thousand two hundred thirty-nine dollars and eighty-four cents, no part of which had been paid, except the sum of two thousand four hundred sixty-seven dollars and sixty-five cents, and that the balance was due and owing. It further alleged that, on April 13, 1918, an account

July 1920]

Opinion Per FULLERTON, J.

of the indebtedness was stated between the parties, "whereby said sum of \$7,772.19 was found to be the balance due." It alleged also that, on or about March 10, 1918, the commissary company became insolvent and unable to pay its creditors in due course, or out of its tangible property, and thereupon, in violation of its duty in the premises, executed and delivered a general assignment of all of its property for the benefit of certain of its creditors, not including the plaintiff, to one E. G. Lindberg, with the intention of excluding the plaintiff from any participation in the division of its assets. Lindberg was not made a party defendant in the action. He, however, afterwards intervened and defended along with the commissary company.

In its answer the commissary company put in issue the allegations of the complaint tending to show liability on its part. It also set up an affirmative defense which need not be set out in detail. In substance, the defense was that the contracting company, in consideration of a receipt given it by the commissary company, promised to present a claim for the items sued upon in its own name to the government for allowance; that it failed so to do, although leading the officers of the commissary company to believe to the contrary; that, if the claim had been presented, it would have been allowed and paid, and that its loss was due solely to the negligence of the construction company.

The action was tried to the court sitting without a jury. The trial judge found that the commissary company had contracted, and the construction company had paid, the obligations which make up the items the auditor refused to allow the construction company in its settlement with the government, and that the obligations were incurred by the commissary company in the conduct of its private business, with which the

construction company had no connection and in which it had no interest. He found that the commissary company, "in the month of May, 1918, agreed in writing to pay to the plaintiff this sum of \$7,772.19." He found that the commissary company later presented a claim to the government for the amount so disallowed, and that the government refused to consider it because not presented in the name of the construction company, with whom alone the government had contracted. He found that thereafter the commissary company informed the construction company of the action of the government and requested that the claim be presented in its name; that it was informed by the construction company that it then had other unsettled claims pending before the government, and that it believed the presentation of this claim would prejudice it in the prosecution of these claims, and refused to so present it. He found that it was reasonably probable that, had the claim been timely presented to the government in the name of the construction company, the same would have been allowed and paid. The sixteenth, seventeenth and eighteenth findings were as follows:

"The defendant sought to estop the plaintiff by showing that plaintiff had undertaken to present and prosecute a claim for the above mentioned balance to the government, and thereby procure its own reimbursement, and that it had not done so; but the court does not find that plaintiff did so undertake, and finds that if it had done so there was no consideration for its undertaking, and no bar therein to the prosecution of this action.

"Prior to the commencement of this action, defendant was an insolvent corporation, and was indebted to sundry creditors, not including plaintiff, for sums aggregating about \$40,000; and to secure the payment of such indebtedness assigned all of its property to the intervenor, E. G. Lindberg, who took and now retains

July 1920]

Opinion Per FULLERTON, J.

all of said property except such as he has paid to said creditors, and has been and now is carrying on defendant's business, as such assignee, for the benefit of said creditors who were not yet fully paid.

"Said Lindberg, from time when he took possession of the property of defendant, being informed of the claim of the plaintiff to be considered a creditor of defendant, kept and reserved in his possession, out of the receipts coming to him from the business of defendant, a sum proportioned to the sums he paid to the other creditors, to be paid to the plaintiff in case it established its debt against defendant by this action; which sum, on the 17th day of January, 1918, amounted to \$4,663.31, and which sum he stipulated to retain for the use of plaintiff, to abide the event of this action."

No direct finding was made on the issue of an account stated, but it is inferable from the findings as a whole that the issue was determined against the construction company.

On these findings the court entered a judgment for the amount deducted by the auditor, this being four dollars and eleven cents less than the total of the items making up the amount. From the judgment so entered, the commissary company and the intervener prosecute this appeal.

The appellants first contend that the respondent's cause of action is founded wholly upon an account stated, and that there is in the record no evidence, or inference arising from evidence, from which it can be found that this account ever became an account stated between the parties. From this the conclusion is drawn that there was a failure of proof, and that the judgment is erroneous, since, in effect, it is a judgment unsupported by evidence. But to this we think there are at least two sufficient answers. The first is that the complaint states facts sufficient to constitute

a cause of action, even if the allegations with reference to an account stated be disregarded. This being so, it may recover on this branch of its case, although the other is not proven. Nor is the complaint, by construing it as stating different grounds for recovery, made duplicitous. Under the practice in this state, where a plaintiff has two or more distinct grounds for the relief he asks, the one not inconsistent with the other, he may set them forth in his complaint in orderly sequence, and may recover if he proves any one or more of them. *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1033; *Loveday v. Anderson*, 18 Wash. 322, 51 Pac. 463; *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023; *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104; *O'Donnell v. McCool*, 89 Wash. 537, 154 Pac. 1090; *Starwich v. Ernst*, 100 Wash. 198, 170 Pac. 584; *Welch v. Northern Bank & Trust Co.*, 100 Wash. 349, 170 Pac. 1029.

The second answer is that to hold with the appellant's conclusion would be to deny the respondent the benefit of the statutes relating to amendments of pleadings. If the allegations of the complaint were wholly upon an account stated, and the evidence failed upon that ground but justified a recovery upon another, the respondent would have been entitled to amend so as to make its allegations conform to its proofs. This court is required, in appealed causes tried to it *de novo*, to regard all amendments as made which could have been made. Rem. Code, § 1752. The effect of the rule is to compel us, in all cases where there is a variance between the allegations of the pleadings and the proofs in evidence, to disregard the pleadings and treat the evidence as stating the issues between the parties. So, here, if it were true that the complaint was based wholly upon an account stated, and the proofs showed a right to recover upon another ground, the variance

July 1920]

Opinion Per FULLERTON, J.

is not fatal to the judgment, since the judgment may rest upon the proofs made.

The trial court found, it will be remembered, that the appellant commissary company, in May, 1918, agreed in writing to pay to the respondent the amount found due by the field auditor. This finding was based on a letter dated May 8, 1918, written by one Nathaniel Paschall to the accounting agent of the respondent in answer to letters from the agent demanding payment of the account. In this letter Mr. Paschall stated that he was endeavoring to get into communication with the officer of the government who had authorized the use of the facilities which resulted in the account, and his cooperation in presenting to the government a claim for reimbursement; adding:

“If this is allowed us, of course, we will make immediate settlement of your claim against our company. If, however, we are unsuccessful we will make partial settlement and will advise you when we can pay the balance.”

It was shown by other proofs that Mr. Paschall was a stockholder in the appellant corporation and its duly elected secretary. But it was shown, also, that the letter was written after the corporation had become insolvent, after it had assigned its property for the benefit of its creditors, and after its assets had been taken into possession by the assignee named in the assignment. The appellant contends, we think correctly, that this evidence does not justify the finding. It is a general rule that contracts and agreements made by an officer of a corporation on behalf of the corporation are binding upon it only when the officer at the time represents the corporation and is authorized to act on its behalf. At this time Mr. Paschall did not represent the corporation in the sense that he

could add to its obligations or create new obligations for it chargeable against its existing property. The corporation was then insolvent. It had made an assignment of its property for the benefit of its creditors. The assignee and the creditors acquired an interest in the property of the corporation in virtue of the assignment. We think it plain that an officer of a corporation, whatever may have been his authority prior to an assignment for the benefit of creditors, cannot thereafter bind the corporation to a new agreement detrimental to the interests of the assignee and the creditors represented by him. To so hold would be to hold that the officers of a corporation could, after an assignment by the corporation for benefit of its creditors, destroy the interests the assignees acquired by the assignment. Treating this promise as an agreement on the part of the corporation to pay an obligation which it was not otherwise obligated to pay, we are clear that it was not obligatory as to the existing property of the corporation in the hands of the assignee.

Whether the letter was admissible as a declaration or admission on the part of the corporation that the obligation sued upon was a just obligation of the corporation incurred prior to the assignment, so as to be chargeable against the property in the hands of the assignee and thus independent evidence of the fact sought to be proved, is a more troublesome question. In our opinion it was not. This, for the reason that it was not the act of the corporation, but the act of an officer who did not then represent its interests. Doubtless the officers of the corporation could testify that the obligation was just and was a proper charge against the property in the hands of the assignee. So, also, could they testify to the contrary. And had this par-

July 1920]

Opinion Per FULLERTON, J.

ticular officer testified that the obligation was not just, the letter could have been introduced to contradict or impeach his testimony, but neither of these considerations, we think, would justify the admission of the letter as evidence of an independent acknowledgment by the corporation of the debt.

It remains to inquire whether there was other evidence in the record from which the trier of fact can find that the indebtedness was established. As to the item for merchandise, the item for meals furnished employees, and the item for repairs of buildings, there is abundant evidence in the record to show that services of this sort were furnished, and that the obligations incurred thereby were obligations incurred for the private use of the appellant corporation. Since the appellant corporation caused them to be paid by the respondent, there arose on its part an implied promise that it would make the loss good to the respondent. The difficulty arises with the items themselves; that is, whether there is evidence from which it can be found that the items are just and represent the true balances due for articles delivered and services performed for which payment has not been made. The field auditor was not sworn, nor did any of the witnesses on the part of either party have knowledge of the true state of the account. But the auditor, in keeping the account, was the agent of both parties. Both assented, or at least acquiesced, in his so doing, and it was necessarily intended that, at the termination of the transaction, he should state the account between them. His statement is, therefore, as between the immediate parties to the transaction, and as between either of the parties and the assignee of one of them, admissible as evidence for or against either of them. No doubt the statement was subject to dispute

as to its correctness, but, being admissible as evidence, it must be taken *prima facie* as being correct. Nor can we find that it was impeached as to these particular items. True, as we have shown, there were two statements, each showing the same total, but differing in the items making up the total. But the power to cast the account includes the power to recast it, and since the recast is not impeached other than by showing a difference in the items, we are constrained to hold that it represents the true state of the account between the parties as to the items mentioned.

We have not overlooked the testimony of an officer of the appellant corporation to the effect that his corporation paid by its own checks for all of the items of merchandise taken from the commissary and applied to the private use of the corporation. It is no doubt true that the corporation did make payments on the account as they were called for by the field auditor, but as its information as to the state of the account from time to time was derived wholly from the auditor, it could not be known by any of the officers whether or not the payments made were payments in full. The account as a whole was large. It involved transactions approximating a half million of dollars. Much material was on hand when the account was ready to close, and its true state could hardly have been known, even to the auditor himself, until the final balance was struck. In view of these facts, we cannot think the evidence of the officer impeaches the auditor's statement.

In this connection the appellant contends that the rate charged for the meals furnished its employees is too large, since the cost is fixed at forty-five cents per meal instead of thirty cents, the rate charged the respondent's employees. But the rate was fixed at the

actual cost, and, in the absence of an agreement to the contrary, the appellant cannot be heard to say that it did not receive the benefit of the service to the extent of such actual cost.

The items for overhead, in which must be included the item for truck services, stand upon a different footing. These were incurred, for the greater part at least, under a direct agreement with the government that the appellant could make use of the facilities which give rise to them without cost to itself. By the terms of the contract between the government and the respondent, the government had an interest in the facilities used in these operations, and had agreed to reimburse the respondent for its expenditures in conducting the operations. The government, therefore, had such a direct interest therein as to empower it to make contracts with reference to their use by another. Since it agreed with the appellant corporation that it could make use of them in messing the officers sent to the army post on the government's business, without charge, and agreed with the respondent that it should suffer no loss by reason thereof, there could arise no promise, either direct or implied, that the appellant would reimburse the respondent for such use, should the government repudiate its promise and charge the cost to the respondent, or, what is the same thing, refuse to allow the cost thereof in its settlement with it. It is not a case referable to the rule which permits a loss, which one of two innocent parties must suffer, to be charged to the party whose act causes the loss. In this instance the appellant is equally innocent with the respondent in act and promise. Both acted on the promise of the government's representative that no charge would be made for the use of the facilities which gives rise to the loss. The appellant, because thereof, did not seek to protect itself against it; in fact,

its charges for the services rendered, in the performance of which it suffered an actual loss as it was, were based on a rate in the making of which this item was not considered. Plainly, we think, the government cannot, by repudiating the contract of its officers and charging the cost to the respondent, make it a charge recoverable by the respondent from the appellant.

With regard to the matter referred to in the sixteenth finding of the court, before quoted, we think the court in error in its findings of fact, but correct in its conclusions with regard thereto on the facts as they appear in the record. The respondent, as we read the evidence, did promise that, as soon as its own accounts with the government were finally adjusted, it would present this claim to the government in its own name on the appellant's behalf, and we think, further, there was a sufficient consideration for the promise. But we cannot conclude that the respondent intended thereby to relieve the appellant from its obligation, or postpone the time of its payment. On the contrary, it contended at all times that the obligation was the obligation of the appellant, but was willing to use its name and its friendly offices in an endeavor to have the government make good the loss to the appellant. The record shows in this connection that these claims had not been adjusted at the time of the trial, and hence no breach of the promise had then occurred.

The foregoing considerations lead to the conclusion that the respondent is entitled to recover from the appellant corporation the sum of the items set forth in the auditor's account under the heads "merchandise," "meals to employees," and "repairs to buildings," but that it is not entitled to recover for the other items listed. A proportionate share of the judgment is payable, of course, from the funds in the hands of the assignee.

July 1920]

Statement of Case.

The judgment is therefore reversed, and the cause is remanded with instructions to enter a judgment in accordance with this opinion.

HOLCOMB, C. J., MAIN, MOUNT, MITCHELL, PARKER, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 15679. Department Two. July 9, 1920.]

H. A. McVEETY, *a Sole Trader Under the Name and Style of Machinery Supply Company, Respondent*,
v. S. E. HAYES *et al.*, *Appellants*.¹

SALES (29)—SUBJECT MATTER—PERSONALTY “APPERTAINING” TO A SAW-MILL. A bill of sale of a sawmill, buildings, engines, equipment and all other articles now on said premises “appertaining to said sawmill and logging outfit,” includes the planking and ties with which cribs and ways were constructed, connecting with a loading platform at a railroad siding where the products of the mill were loaded.

PLEADING (61-64)—COUNTERCLAIM—NECESSITY OF PLEADING. In an action for the value of cribs and ways, consisting of ties and planking, converted by the defendant, in the absence of pleading and proof as to defendant's cost in dismantling the ways, defendant cannot claim an offset of such cost against the value of the material as shown by the price for which it was sold.

TROVER AND CONVERSION (36)—DAMAGES—AMOUNT FOR WHICH PROPERTY WAS SOLD. In an action for the conversion of lumber and materials, the value is sufficiently shown by the price for which the defendant sold it, and which was paid into court.

APPEAL (451)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. The admission of improper evidence is harmless, in an action tried before the court without a jury, and triable de novo on appeal.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 26, 1919, upon findings in favor of the plaintiff, in an action for conversion, tried to the court. Affirmed.

¹Reported in 191 Pac. 401.

Israel Nelson, Robert C. Saunders, and Arthur H. Hutchinson, for appellants.

Earl G. Rice and Gates & Helsell, for respondent.

FULLERTON, J.—On March 25, 1918, and for some two years prior thereto, the appellants, Hayes, owned a sawmill located near Dent's Spur, a station or siding on the Chicago, Milwaukee & Puget Sound Railway Company's railroad in King county. The mill proper was some half of a mile back from the siding, and to connect it therewith, a water flume was constructed reaching from the mill to the siding. At the end of the flume at the siding, a platform some sixteen feet wide and thirty-two feet long was constructed parallel with a spur track at that place. The purpose of the flume was to carry the products of the mill to the siding. These, as they came from the saws of the mill, were thrown into the flume, whence they were carried by the water flowing therein to the platform mentioned. To increase the storage room at the platform, two runways were constructed. One of these was connected immediately with the platform, and extended back therefrom about one hundred and fifty feet in the direction of the mill. It was constructed by piling the ties in the form of cribs, after the manner of a log house, to the height of the platform and covering the same with planks laid lengthwise with the runway, the cribs being about six feet apart. The planks were held in place by nails driven through the outer tier of planks into the ties; the intermediate planks having no other fastenings. The other runway was of practically the same dimensions and was constructed in the same way. It, however, did not connect directly with the platform mentioned. An extension of the platform was made by piling ties in crib

July 1920]

Opinion Per FULLERTON, J.

form, but solidly outwardly from one of its ends for a distance of forty feet, and with this the runway connected. The runways were constructed shortly after the appellants purchased the mill, and were used in connection with the operations of the mill as long as it was operated by them. The ties used therein were in part hewn ties found on the premises at the time the appellants purchased the property, and in part by second class ties cut in the mill. The first of these had practically no commercial value, and the second very little at the time the runways were constructed.

On the date first mentioned, the appellants sold the mill property to the respondent. At that time the timber adjacent to the mill had become exhausted, and it was no longer profitable to operate it at that place. The respondent is a dealer in second-hand machinery, and the mill property was purchased by him for the purpose of being dismantled and sold as second-hand material. The sale was evidenced by a written bill of sale, the material parts of which follow:

"This Agreement made this 25th day of March, 1918, S. E. and M. C. Hayes doing business under the firm name and style of the S. E. Hayes Lumber Co., of Seattle, Wash., first party, and Machinery Supply Company, second party, of same place, Witnesseth:

"That for and in consideration of the sum of sixty-five hundred dollars (\$6,500) in hand paid by second party to first party, receipt whereof by first party is hereby admitted, first party does hereby sell, assign, transfer and set over to second party all of the following described personal property, lying, being and situated at Dent's Spur, King county, Washington:

"One sawmill and buildings, donkey engines and all equipment including lines, blocks, tackles, etc., saws, boilers and all other articles of every nature whatsoever now on said premises and appertaining to said sawmill and logging outfit, hereby warranting title to said above described property."

Prior to the execution of the bill of sale, the appellants had taken up and had removed the ties forming the extension to the platform, but the runways, save as one of them was affected by the removal of the ties forming the extension, remained intact in the form in which they were originally constructed. After the sale and after the payment of the purchase price of the property, the appellants dismantled the runways and appropriated to their own use the planking forming the tops of the same and such of the ties forming the supports as they found had a commercial value.

This action was brought to recover the value of the property so appropriated. It was tried to the court sitting without a jury, and resulted in a judgment in favor of the respondent.

The ultimate question is whether these ways passed under the bill of sale. Turning to that instrument, it will be observed that its terms are comprehensive. After enumerating specifically certain of the properties sold, it concludes with a general designation, "and all other articles of every nature whatsoever now on said premises and appertaining to said sawmill and logging outfit." This clause of the contract, except as it is limited by the qualifying phrase, "appertaining to said sawmill and logging outfit," is broad enough to include all of the personal property on the mill premises, and these ways, since they are, under the conditions shown in the record, personal property, are included in the bill of sale, unless they are exempted by the qualifying phrase. The question then is, are they so exempted. It seems to us clear that they are not. Without attempting a general definition of the term "appertaining," it can be said that a thing appertains to another thing when it is constructed to be used in connection with that other

July 1920]

Opinion Per FULLERTON, J.

thing, and is used in connection therewith. It can hardly be doubted, we think, that these ways were so constructed and so used. Their purpose was to provide a means by which the products of the mill could be stored and cared for while awaiting shipment, and that they were so used for practically the entire time the mill was operated by the appellants, the evidence is clear. When it is remembered that the ties were in part those on the premises when the appellants purchased the mill property, that the remainder were second class ties having then but little salable value, and that all were piled in the form of cribs, "after the manner of a log house," and not solidly as merchantable ties are usually piled for storage, and that no more were used than was necessary to furnish a foundation for the planking placed upon them, it is difficult to follow the appellants in their argument to the effect that temporary storage only was intended. Plainly, it seems to us, these ways as much appertained to the mill property as did the platform constructed on posts, the flume, and other like structures, which concededly passed by the bill of sale.

We have not overlooked the testimony of the appellants to the effect that the materials out of which the ways were constructed were inventoried in the account books of the appellant as merchantable materials, and were so regarded by them at all times as assets when taking accounts of the mill property. But this is hardly conclusive. Undoubtedly they had some value, and any correct system of bookkeeping would show them as having value. But the same thing can be said of the property which concededly passed to the respondent. This property was, or should have been, upon the books in the same manner, and if the fact argues in favor of exempting these ways from the

operation of the bill of sale, it argues in favor of exempting everything not specifically enumerated.

At the time the bill of sale was delivered and the purchase price paid, the respondent asked the appellants for a writing, directed to the watchman or keeper at the mill premises, showing his right to the mill property. In compliance with the request, the appellant in charge of the negotiations wrote and gave the appellant the following.

“Steve: It is O. K. to let the bearer remove anything they wish except the lumber platform or lumber trucks.
S. E. Hayes.”

It is contended by the appellants that this is a contemporaneous construction of the terms of the bill of sale, and shows that it was not the intention of the parties that the lumber platform and ways were to be included therein. But it will be observed that it is the lumber platform only, not the ways, that are mentioned in the writing, and to construe it as explanatory of the bill of sale rather supports the respondent's construction of the instrument than it does the construction of the appellants. But the evidence makes clear the purpose of the writing. The appellants had in stacks by the side of the ways a considerable quantity of merchantable material which was not included in the bill of sale, and which the ways and platform furnished a convenient, if not a necessary means of carrying to the railroad for shipment. This fact furnished the reason for the reservation in the order; the appellants desired, and the respondent consented, that these instrumentalities should remain in place until the lumber was removed.

A further contention is that the recovery is too large, since no deduction was made for the cost of removing the ways and transporting the materials of

July 1920]

Opinion Per FULLERTON, J.

which they were composed to market. The evidence shows that the purchaser of the property, to whom it was sold by appellants, paid the freight thereon from Dent's Spur, the location of the ways, to the place of sale, and that the amount of the recovery was for the value of the materials less this freight. There was, however, no allowance for the expense of dismantling the ways and loading the materials on the cars. But no counterclaim was pleaded for this service and no evidence was offered tending to show the value of such services. Overlooking the fact that the appellants were wrongdoers in removing the materials and possibly could make no claim for the service for that reason, the absence of pleading and proof precludes the consideration of the question.

It is also said there was no proof of value. On the question the record shows that the purchaser of the materials paid into court the sum it was agreed between the purchaser and the appellants that the appellants had received for the materials, and that the court adopted this sum as the measure of the value of the materials. We think clearly that it was justified in so doing.

Finally, it is contended that the appellants are entitled to a reversal and a new trial because of the admission of irrelevant and incompetent evidence. But the cause was tried by the court sitting without a jury, and is triable in this court *de novo*. In such cases, as we have repeatedly held, the admission of improper testimony is not reversible error. The question in such cases is whether the competent evidence supports the judgment. In this instance we find that it does, ignoring all that the appellants deem inadmissible.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 15840. Department One. July 9, 1920.]

BENJAMIN H. GREENWOOD, *Appellant*, v. PUGET MILL
COMPANY, *Respondent*.¹

DISMISSAL AND NONSUIT (21)—WANT OF PROSECUTION. It is not an abuse of discretion to dismiss an action for want of prosecution where no effort was made by plaintiff to bring it to trial for ten years, and repeated continuances had been granted at plaintiff's request.

ARMY AND NAVY—ACTIONS—PROSECUTION—SOLDIERS CIVIL RELIEF. A sea captain engaged in carrying munitions of war and transporting soldiers during the late war, is not within a service covered by the Soldiers and Sailors Civil Relief Act (U. S. Comp. St. Ann. Sup. 1919, §§ 3078¼ a et seq.); nor could he ask a continuance of a civil action upon a showing of fact not made in the manner required by the act.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 22, 1919, dismissing an action for personal injuries for failure to prosecute. Affirmed.

R. B. Brown and Cole & Dolby, for appellant.

Chadwick, McMicken, Ramsey & Rupp and *John P. Garvin*, for respondent.

MAIN, J.—This is an appeal by the plaintiff from a judgment of the superior court dismissing an action for want of prosecution. On December 17, 1904, the appellant, while in the employ of the respondent, sustained a personal injury which he claimed was due to the negligence of the respondent. On October 2, 1908, he brought an action, by his guardian *ad litem*, to recover for the injury. In the complaint it was alleged that the appellant would be twenty years of age on the 13th day of November, 1908. The steps in the action prior to April 30, 1909, when the appel-

¹Reported in 191 Pac. 393.

July 1920]

Opinion Per MAIN, J.

lant demurred to the affirmative defense in the answer, need not be detailed.

The appellant became twenty-one years of age on the 13th day of November, 1909, and sometime thereafter was substituted as a party to the action. Subsequent to this time there were no steps taken in the action prior to March 8, 1913, when the demurrer was heard and overruled. On September 29, 1915, the reply was served. On January 26, 1917, the respondent caused the case to be placed upon the trial calendar of the superior court. The appellant, a few days thereafter, filed a motion for continuance not to exceed six months. Thereafter, and during the month of May of the same year, the respondent again caused the case to be placed upon the trial calendar, and on the second of June, 1917, it was again stricken therefrom upon application of the appellant. Certain matters occurring in the action from this time to June 28, 1919, when the court entered the order directing that the cause be tried not later than September 30 of that year, need not be detailed. On September 22, 1919, the case was regularly called for trial. The appellant declined to introduce any testimony and urged a motion for continuance supported by the affidavit of one of his counsel. The motion for continuance was denied, and the appellant declining to offer any evidence, upon motion of the respondent, the cause was dismissed. The record is barren of any showing that the appellant, from the time he became twenty-one years of age until the cause was dismissed, had made any effort to bring it on for trial. This was a period of approximately ten years.

In the affidavit for continuance made by counsel for the appellant, it is stated that the appellant was a seafaring man, being captain of the steamship Edge-

comb, which was engaged in carrying munitions of war and transporting soldiers from the United States to ports in France and elsewhere in Europe, and in carrying home returning soldiers. It is stated in the affidavit that the appellant was engaged in this service since the beginning of the war with Germany and up to the time of the filing of the affidavit, which was made at or shortly before the time when the judgment dismissing the cause was entered. The action of the court in dismissing the cause was not an abuse of discretion, under the holdings of this court in similar cases. *Langford v. Murphey*, 30 Wash. 499, 70 Pac. 1112; *Hoffmeister v. Renton Co-op. Coal Co.*, 40 Wash. 48, 82 Pac. 127; *First National Bank of Fon du Lac v. Hunt*, 40 Wash. 190, 82 Pac. 285; *Rehmke v. Fogarty*, 57 Wash. 412, 107 Pac. 184. As pointed out in *Arthur v. Washington Water Power Co.*, 42 Wash. 431, 85 Pac. 28, the appellant having brought the action, the "duty was particularly upon him to see that diligence was exercised." Every effort that was made to bring the cause on for hearing was on the part of the respondent.

It is claimed, however, that, since the appellant was engaged in the performance of war duties, as above indicated, under the act of Congress of March 8, 1918, Title XVI, 1918 Statutes, commonly known as the Soldiers' and Sailors' Civil Relief act, (U. S. Comp. St. Ann. Sup. 1919, §§ 3078¹/₄ a et. seq.) the cause should not have been dismissed. To this contention there are two answers: first, the appellant was not engaged in a service covered by the act; and second, assuming that he was engaged in such service, the showing of this fact was not made in the manner provided for in the Federal statute.

The judgment will be affirmed.

PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

July 1920]

Opinion Per TOLMAN, J.

[No. 15689. Department Two. July 9, 1920.]

CELIA LASMAN *et al.*, *Appellants*, v. CALHOUN, DENNY
& EWING, *Respondent*, JOSEPH CONNELL *et al.*,
Defendants.¹

PRINCIPAL AND AGENT (56, 56-1)—LIABILITIES OF AGENT—FRAUD. An agent is liable in tort for false representations of material facts inducing plaintiff to purchase lands of his principal if he knew the statements to be false, or if he made them as positive assertions calculated to convey the impression that he had actual knowledge of their truth, when in fact he had no such knowledge; and he cannot escape liability by claiming that the information was based solely on information furnished by the principal.

FRAUD (4, 5, 22)—MATTERS OF FACT OR OPINIONS—EVIDENCE—SUFFICIENCY. Sales agents who visited the land with a view of accepting the agency and could easily have ascertained that it was alkali and unfit for cultivation, and who knew there was no irrigation system in operation, are liable for false representations as to the character of the soil and crops that could be grown, and that an irrigation system had been built and was in operation; such representations being more than mere opinion.

Appeal by plaintiffs from a judgment of the superior court for King county, Allen, J., entered May 28, 1919, in favor of one of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for rescission. Reversed.

Burkheimer & Burkheimer, for appellants.

Hartman & Hartman, for respondent.

TOLMAN, J.—This action was commenced in Grant county, upon a complaint alleging fraud in consummating a sale of real estate, and praying for a rescission of the sale and a recovery of the purchase price. A change of venue was had to King county, and there, and before any of the defendants had answered, appellants, who were plaintiffs below, filed an amended

¹Reported in 191 Pac. 409.

complaint, alleging fraud and misrepresentation in the negotiations leading up to the purchase of the land by them, upon which they relied in making the purchase; that they expended considerable sums of money in buying lumber and materials for buildings, fences and improvements; that they also purchased farm implements, work horses, feed and supplies, and expended their own labor and that of hired help over a considerable period of time, relying upon the representations made as to the character of the land, and before they could discover the falsity of such representations; that the land proved to be worthless for agricultural purposes, for which it was purchased, or for any purpose, and alleged that they had been damaged in the sum of \$8,894.85, for which amount, together with interest and costs, they demanded judgment.

After moving to strike the amended complaint, respondents answered by making general denials, and pleading affirmatively

“That the said plaintiffs at all times knew and were advised that this answering defendant was agent only of the defendants Connell and Patten, Trustees, . . . that the said plaintiffs never assumed to hold the answering defendant responsible for any statement, representation, act or deed, save as agent acting for its principal, and the principals . . . were and are known to the said plaintiffs.”

A demurrer to this affirmative defense having been overruled and the remaining defendants having answered, the cause proceeded to trial, resulting in a verdict in favor of appellants and against all of the defendants in the sum of \$6,632. This verdict was set aside and a new trial granted. Upon the second trial, a verdict against all of the defendants in the sum of eight thousand dollars was rendered. A mo-

July 1920]

Opinion Per TOLMAN, J.

tion for judgment *non obstante veredicto* was made, which was denied as to the defendants Joseph Connell and Alfred Patten, Trustees (against whom judgment was rendered on the verdict, from which they have not appealed), and granted as to respondent, and judgment rendered in its favor dismissing the action as to it and awarding it costs. The plaintiffs have appealed from such judgment of dismissal. We are therefore confronted by the single question, Was the respondent, Calhoun, Denny & Ewing, entitled to a judgment notwithstanding the verdict of the jury?

It appears that title to the land sold was in the defendants Joseph Connell and Alfred Patten, Trustees, who resided in Chicago, and who appeared in the transaction with appellants only through their agent, Calhoun, Denny & Ewing, and perhaps other agents located in the vicinity of the land sold. It is not claimed that Connell and Patten were guilty of any active fraud or misrepresentation. Their liability having arisen solely by reason of the acts of their agent, Calhoun, Denny & Ewing, and appellants, in addition, seek to hold Calhoun, Denny & Ewing for its own alleged fraud, under authority of *Garrett v. Sparks Brothers*, 61 Wash. 397, 112 Pac. 501, where it is said:

“It is fundamental that a party, whether acting for himself or another, is liable in damages for his own fraud. The fact that the principal is also liable does not relieve from responsibility the party who actually commits the wrong. In such cases, the liability of the principal can only rest upon the delict of its agent. The party who has been wronged may elect to sue either or both.”

Respondent does not dispute the correctness of this rule, but argues that, since the agent is one who is employed by, and authorized to act for, his principal,

third parties knowing him to be such agent, are bound to take notice of the fact that he is so acting for his principal, and if the agent speaks honestly and in good faith from information furnished to him by his principal, with a belief in the truth of his statements, there can be no liability upon the part of the agent, though, if the information furnished by the principal be false and untrue, the principal may be liable. In support of this position respondent cites the following cases, which, so far as the facts there involved appear to go, so hold: *Hillis Logging Co. v. Mescher*, 69 Wash. 454, 125 Pac. 768; *Lipscomb v. Kitrell*, 11 Humphr. (30 Tenn.) 256; *Barton v. Cox*, 176 S. W. (Tex. Civ. App.) 793; *Vertress v. Head & Matthews*, 138 Ky. 83, 127 S. W. 523; *Wimple v. Patterson*, 117 S. W. (Tex. Civ. App.) 1034.

In the case last cited, what we conceive to be the true rule is stated in the following language:

“If, under the circumstances stated, the agent becomes liable to the purchaser for damages suffered by him, it is by force of other principles of law than those which measure and fix the rights of parties to a contract. His liability, under such circumstances, must be measured by the law of torts. For his fraudulent acts he is responsible to the buyer. He is not liable on the contract negotiated by him for his principal, but he is liable for his own fraud and deceit practiced on the purchaser to induce him to enter into the contract. If the fraud or deceit charged consists of false representations as to material facts made to the purchaser, to show a liability on the part of the agent it must be made to appear that he made such representations knowing them to be false, or, as stated by a writer in 20 Cyc. 24, that he made them ‘as a positive assertion calculated to convey the impression that he had actual knowledge of their truth, when in fact he was conscious that he had no such knowledge.’ It follows, from the principles stated, that when the agent, so acting within the scope of his employment

July 1920]

Opinion Per TOLMAN, J.

as to bind his principal, honestly believes representations made by him to induce the purchaser to contract with his principal to be true, he is not liable either on the contract or as for a tort."

We must, therefore, turn to the record to determine whether or not there was any evidence sufficient to go to the jury upon the question of statements and representations having been made by Calhoun, Denny & Ewing to appellants to induce them to purchase the land in question, with the knowledge that such statements were false; or, if not actually known to be false, were they made as a positive assertion calculated to convey the impression that respondent had actual knowledge of their truth, when in fact it was conscious of the fact that it had no such knowledge, and was by it intended that appellants should rely thereon in making the contemplated purchase?

The witness Elwell, who was employed by Calhoun, Denny & Ewing at the time of the sale, testified that he was an experienced land salesman; that, before his employer accepted the agency of the land, he went over and examined it, reported favorably upon it, and his report, coupled with a like favorable report from the immigration agent of the Chicago, Milwaukee & St. Paul Railway Company induced his firm to accept the agency; that thereafter they were furnished with a technical report made by an engineer from Chicago, and that Calhoun, Denny & Ewing made up the advertising circular from this report. The circular, which seems to have been the first thing to interest appellants, is as follows:

"Alfalfa Land

"*With Water*—\$99 an acre on small payment plan, in State of Washington.

"Public Notice

"Notice is hereby given that our immigration department is about to throw open the first block in a

total area of 20,000 acres of choice alfalfa, farm and fruit land at first prices.

"The tract is located near Corfu, on the main line of the Chicago, Milwaukee & St. Paul Railway, in Grant county, a short distance east from Ellensburg, state of Washington.

"A modern irrigation system has been built and is now in successful operation. Instead of pumping water, the system is an all gravity flow. The source of the water is Moses Lake, Lynn Coulee, the Goose Lake reservoir system which is in reality a chain of smaller lakes, and the canal system of which Crab Creek forms a part. The maximum water supply developed will cover approximately 20,000 acres, the first block of which is now open to sale.

"The price of \$99 an acre for land and water is less than half the usual price on many other projects for land and water; and an important feature of this property is that instead of water simply being in prospect, it is already there. The special price is, of course, temporary, and is subject to change without notice. This offer is made to call the attention of the public to the opening of a new era in irrigated land. No stumps or timber to clear.

"The water right provides practically three acre-feet of water for each acre of land, more water than can be used for most crops. On the first block of land, ground water is found at a depth of 10 to 15 feet.

"The surface drainage area directly tributary to Moses Lake, Lynn Coulee and Crab Creek is about 1,000 square miles; while the underground drainage indirectly tributary to the same water channels is 2,124 square miles.

"The chain of reservoir lakes alone, between Moses Lake and this property, will store in reserve approximately 10,000 acre-feet; this in addition to practically 10,000 to 15,000 second-feet flow from the other waterway sources, and accounts for the ample water supply for the property.

"Corfu is a small village and depot located on the 'Milwaukee' main line, on the edge of the property. It has a fine brick school building, shipping station,

July 1920]

Opinion Per TOLMAN, J.

general store, post office and grain warehouse, in addition to other buildings and concerns. The distance to Seattle is 178 miles, and to Spokane about 200 miles. The altitude of the town is about 800 feet above sea level. Some of the drainage area is nearly 2,000 feet above sea level.

"The annual rainfall at Corfu averages about 11 inches. On some of the uplands it runs as high as 20 inches. This accounts for the abundant range nearby for stock, much of it free. The length of the growing season averages 180 days.

"The climate is fairly on a par with that of the Puget Sound country, less the rainfall. The temperature ranges from an average of 50 degrees in the winter to a summer average of 75. A few cold days in mid-winter and a few days of higher temperature in mid-summer do not alter the average. The valley is largely sheltered from winds usual in some other sections by a range of hills stretching east and west through the south end of the valley, across the path of the prevailing winds.

"The first block of land resembles a 'meadow,' level and covered mainly by coarse grass and black sagebrush. In the main, the soil is a deep, black loam, much like the truck gardens near Seattle and other large cities. This valley is traversed east to west by two channels of Crab Creek. The slope down the valley averages 12 feet to the mile.

"Crops that thrive under irrigation here are alfalfa, wheat, rye, flax, potatoes, grasses and all kinds of vegetables. Cows, hogs and poultry bid fair to prove a specialty; while apples are well adapted to the slopes. The conditions are considered ideal for grape vineyards.

"Alfalfa growing is demonstrated on identical land nearby, where last year 36 acres ran over seven tons to the acre. Six tons per acre is a reasonable average per year. Plans are being considered for an alfalfa mill at Corfu to cost \$7,000.

"The opening of this property to farming will result in great development during the next few years. Early arrivals can secure small productive farms, at original

prices. Opening prices for land and water run \$99 an acre. One-fourth cash payment, balance on easy time at 6 per cent. The company will cooperate with settlers in every possible way. Ask for special excursion rates to the property. Apply to

“Calhoun, Denny & Ewing
“Alaska Building, Seattle, U. S. A.
“Sole Agents.”

According to appellant's testimony, the oral representations of Elwell and White, another salesman in the employ of respondent, went considerably further than the circular; but, passing that, we think the jury, having before it the circular, the engineer's report from which it was said to have been made, and the testimony of the various witnesses as to the land, its character, soil, productivity and suitability for agricultural purposes, and the existence or non-existence of an adequate irrigation system appurtenant thereto, might have found that respondents, by this circular, made statements which they knew to be false, or which they had no reason to believe to be true, in the following particulars: (a) As to the completion of a modern irrigation system and water being already on the land; (b) as to the soil being deep black loam, much like the truck gardens near Seattle and other large cities; and (c) as to the crops which would thrive thereon, and especially as to the seven tons of alfalfa being grown per acre on identical land nearby. The engineer's report shows that the irrigation system was a contemplated one and uncompleted when that report was made, and appellants testified that, after they went upon the land, there was no water available. The engineer's report fails to say that the land is deep black loam or to tell what the soil consists of, nor does it intimate any similarity between this soil and that of the truck gardens near Seattle, with which appel-

July 1920]

Opinion Per TOLMAN, J.

lants, as they resided in Seattle, might be deemed to have some familiarity, and there was testimony that it was flooded every winter and spring until well into the summer, could not be cultivated at all until after the floods receded, too late in the summer for crop growing, and when dry enough to cultivate, it immediately hardened like cement, and was so impregnated with black alkali that it would produce nothing but grease wood and salt grass, neither being of any value. And lastly, while speaking generally of oats, wheat, rye, flax, potatoes and all kinds of vegetables thriving under irrigation, alfalfa and grasses doing exceptionally well, and the sloping hillsides being adapted to apple raising, the report further on refers to the bottom lands being suitable for alfalfa, in such a way as to somewhat modify the prior general statement, and nowhere bears out in full the glowing terms of the circular as to productivity.

Mr. Elwell's testimony shows him to have been engaged in selling Washington lands for fifteen years, and the abstract shows his opportunity for knowing the real character of this particular land, as follows:

"I prepared that circular. I have been at the town of Corfu. Was first there in the spring of 1915. I would not be sure about that date, whether it was 1914 or 1915. I cannot tell the date for sure, but it was before I wrote this circular. I think I was at Corfu twice up to this time. I had been out over the land. Possibly sixty days elapsed between my two visits just referred to. I examined the land at that time for the purpose of drafting this circular. I will correct that to some extent. I was examining the land with a view to the firm accepting the agency for the land. I wouldn't know whether I was going to prepare a circular or not unless we took the agency. I was there at least twice before this circular was prepared. I might possibly have been there more times. It is quite

a little while ago. It is pretty certain that I was there a number of times after that before this was published and before Mr. Lasman bought it."

From this testimony, coupled with other testimony in the record to the effect that one familiar with alkali lands could readily detect the presence of alkali, black or white, from the appearance of the land and the vegetation growing thereon, the jury might well have drawn its conclusion that the representations contained in the circular were falsely made, or at least so recklessly made, in view of Mr. Elwell's capacity and opportunity to have learned the truth, as to be equivalent to deliberate falsity.

We think the representations made were something more than mere opinion. Whether appellants were qualified to, and did, make an independent investigation, the evidence being very conflicting with regard thereto, was a question for the jury, and the affirmative answer, even though it had been so amended as to allege that the representations were based solely upon information furnished by the principal to the agent, presented an issue which, under the evidence, the jury could and did resolve against respondent.

We therefore conclude that the judgment appealed from must be reversed, with instruction to the trial court to enter judgment on the verdict of the jury.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

July 1920]

Opinion Per PARKER, J.

[No. 15934. Department One. July 9, 1920.]

THE STATE OF WASHINGTON, *on the Relation of W. A. Bouffleur et al., Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *Respondent*.¹

SCHOOLS AND SCHOOL DISTRICTS (7-1, 8)—CHANGE OF BOUNDARIES—PETITION—"HEADS OF FAMILIES"—POWERS OF OFFICERS. Under Rem. Code, § 4433, the county superintendent cannot transfer portions of one school district to another where it is made to appear at the hearing that the petition for the change was not signed by a majority of the heads of families residing in the territory transferred.

SAME (7-1, 8). Rem. Code, § 4433, requiring a majority of the heads of families to sign a petition for transferring territory from one district to another, means all heads of families, regardless of whether they have children of school age or not.

Certiorari to review a judgment of the superior court for Pierce county, Fletcher, J., entered May 29, 1920, affirming a decision of the county school superintendent in changing the boundaries of a school district, after a hearing before the court. Reversed.

H. G. & Dix H. Rowland, for relators.

Hugo Metzler, for respondent.

PARKER, J.—The relators seek review and reversal of a judgment of the superior court for Pierce county affirming a decision and order of the superintendent of public schools for that county, transferring a portion of the territory of School District No. 33 to School District No. 124 of that county. The law under which such transfer of territory was assumed to be made by the superintendent is found in § 4433, Rem. Code, which, so far as pertinent to our present inquiry, reads as follows:

"For the purpose of transferring territory from one district to another or enlarging the boundaries of

¹Reported in 191 Pac. 621.

any school district, a petition in writing shall be presented to the county superintendent, signed by a majority of heads of families residing in the territory which it is proposed to transfer or include, . . . which petition shall describe the change which it is proposed to have made."

This is followed by provisions for the giving of notice and for a hearing before the superintendent and rendering of a decision by him as to whether or not the proposed change shall be made, and the making of an order by him accordingly. The only questions considered by the superior court and to be here considered are: (1) Whether or not the filing of the petition with the superintendent, signed by a "majority of the heads of families residing in the territory," is jurisdictional; that is, whether or not the superintendent is authorized to entertain the question of such a change of territory in a given case without the filing of such a petition with him; and (2) whether or not the petition filed with him upon which he acted in this controversy was signed by the required number of such qualified persons.

As to the first question, it seems plain to us that the superintendent is constituted a special tribunal of limited jurisdiction for the purpose of determining the question of whether or not the change of territory shall be made, and that he can rightfully entertain the question in a given case only when the question is presented to him in the manner and after giving the notice prescribed by law. Should he entertain the question of a change in a given case upon a petition which, after due inquiry, he finds does contain the signatures of a majority of the "heads of families residing in the territory," an interested person thereafter seeking to have the question of the sufficiency of such a petition as to the required number of signatures reviewed in

July 1920]

Opinion Per PARKER, J.

the courts, after the change is fully consummated and new rights of the respective districts became vested, flowing from acts done by or on their behalf upon the faith of such change being lawfully made, it is highly probable that an estoppel would arise as against all such persons so challenging the sufficiency of the petition, since necessarily the sufficiency of the number of signatures to such petition becomes one of fact as well as law. That, however, is not this case. It is not claimed here that there is any estoppel or laches which can be invoked as against these relators. Their challenge to the sufficiency of the petition here in question was manifestly timely made. We are, therefore, of the opinion that, if it was made to appear at the hearing of this case in the superior court that the petition did not have the signatures of "a majority of the heads of families residing in the territory," the decision and order of the superintendent, and the judgment of the superior court affirming such order and decision, must be reversed.

The petition here in question was filed with the superintendent on May 17, 1919. Thereafter, due notice being given, a hearing was had before him, at which these relators and other interested persons remonstrated against the making of the proposed change. Thereafter, on August 6, 1919, the superintendent being of the opinion that the petition was signed by the required number of persons qualified to sign such petition, made his decision ordering the change of the territory substantially as prayed for by the petitioners; thereafter the matter was timely brought into the superior court, where a hearing was had and evidence adduced touching the questions above noticed, and on May 29, 1920, the superior court rendered its decision and judgment affirming the decision and order of the superintendent, wherein it found, among other things:

"That said petition filed with the county superintendent of public schools, contained the names of a majority of the residents and *heads of families* of said disputed territory, petitioned to be transferred as hereinafter described, *who had dependent upon them for support, care and education, children of school age,*

"That said petition did not contain a majority of the names of *residents, heads of families of said disputed territory, who had dependent upon them other persons than children of school age,*"

It is apparent from the record before us that the court affirmed the decision and order of the superintendent upon the theory that the words "heads of families," as used in the law above quoted, means only heads of families having children of school age dependent upon them, and excludes heads of families having others dependent upon them, and that, since the petition had the signatures of a majority of heads of families having children of school age dependent upon them, it was sufficient, though it did not contain the signatures of a majority of the heads of families of the territory proposed to be changed, having others dependent upon them. So the question is, do the words "heads of families," as used in the law, have the restricted meaning which is the basis of the decision of the superintendent and the trial court? Nowhere in our school statutes is to be found any definition of the words "heads of families." We must, therefore, we think, look to the primary common acceptation of the meaning of the word "family." No authority or decision has come to our notice suggesting the view that the word "family" has any such restricted meaning as has been attributed to it by the superintendent and the superior court, in the absence of a statutory definition so restricting the meaning of the word. In *Dodge*

July 1920]

Opinion Per PARKER, J.

v. Boston & Providence R. Co., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318, it is said:

"The word 'family' has several meanings. Its primary meaning is a collective body of persons who live in one house under one head or management. Its secondary meaning is those who are of the same lineage, or descend from one common progenitor. Unless the context manifests a different intention the word 'family' is usually construed in its primary sense."

Observations of similar import may be found in *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553; *Arnold v. Waltz*, 53 Ia. 706, 6 N. W. 40, and many other decisions where the meaning of the word is uncontrolled by some express words of definition to be found in the statute or document in which it may be used. 19 Cyc. 451; Bouvier's Law Dict., Rawle's Third Edition, 1186.

Counsel for respondent calls our attention to and relies upon the decision of the Minnesota court in *Oppgaard v. Board of County Commissioners*, 120 Minn. 443, 139 N. W. 949, 43 L. R. A. (N. S.) 936. We think, however, a critical reading of that decision will show that it comes nearer lending support to relators' contention here made. In that case there was involved the term "legal voters," as specifying the persons who might petition in certain cases for the enlargement of a school district. At the time in question, women had certain franchise rights in Minnesota in the determination of certain school matters, but did not have the right to vote generally upon or for other public questions or officers. The statute in question not having defined the words "legal voters," it was held that they must be taken in their ordinary and usual sense, and hence did not include women. Such, we think, is the sense in which the words "heads of families," as used in this statute, must be taken.

We are referred to the opinion of the *Attorney General* rendered in 1891, found at page 162, Opinions of the Attorney General of that year, claimed to have been followed by the school authorities. The words "heads of families" there in question were found in the school law relating to the organization of new districts, the law reading in part:

"For the purpose of organizing a new district a petition in writing shall be made to the county superintendent, signed by at least five *heads of families*, etc." Laws of 1891, p. 246.

In response to an inquiry addressed to him by the state superintendent of public instruction as to the meaning of the words "heads of families" as used in the statute, the *Attorney General* concluded his opinion as follows:

"For the foregoing reasons, I am of the opinion that any person who is the actual head of a family, that is, who is under legal obligations to provide for the support and education of persons dependent upon him, and who is in fact providing for their education and support, is the head of a family and qualified to sign the petition mentioned in the section referred to, whether he be a legal voter or not."

It is plain that the question here presented was not there considered. There is no question here presented as to whether or not the head of a family must be a voter in order to be entitled to sign the petition; our only inquiry being as to whether or not heads of families having others dependent upon them than children of school age constitute a part of the class a majority of which must sign the petition in order to initiate proceedings looking to a change of territory from one school district to another. According to the specific finding of the superior court made in this case, there was not a majority of the heads of families, including

July 1920]

Opinion Per MAIN, J.

those having children other than those of school age dependent upon them, who signed the petition. We are not advised by this record that the school authorities of the counties have generally construed the law as is here contended for by counsel for respondent; but if such be the fact, we think such construction is so clearly erroneous that we should not adopt it.

The decision and order of the superintendent of public schools for Pierce county, which assumed to make the change of territory in question, and the judgment of the superior court affirming the same, are reversed and set aside.

HOLCOMB, C. J., MAIN, MITCHELL, and FULLERTON, JJ., concur.

[No. 15749. Department One. July 12, 1920.]

BENNINGTON COUNTY SAVINGS BANK, *Appellant*, v.
ROWE FRANCE *et al.*, *Respondents*.¹

JUDGMENT (115)—VACATION—GROUNDS—FRAUD—PERJURY OR FALSE TESTIMONY. Perjury alone is not an equitable ground for setting aside a judgment obtained on false testimony, in the absence of extrinsic or collateral fraud.

Appeal from a judgment of the superior court for King county, Hall, J., entered November 26, 1919, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief. Affirmed.

James A. Dougan, for appellant.

Griffin & Griffin, and *V. G. Frost*, for respondents.

MAIN, J.—The plaintiff brought this action in equity to set aside a judgment claimed to have been induced by perjured testimony. To the second amended com-

¹Reported in 191 Pac. 616.

plaint, which will be referred to as the complaint, a demurrer was interposed and sustained by the trial court. The plaintiff refused to plead further and elected to stand upon the complaint. A judgment was entered dismissing the action, from which the appeal is prosecuted. The complaint is too long to be here set out in full. The controlling facts therein alleged will be summarized. On May 23, 1916, a mortgage, purported to be executed by H. B. Petridge, covering certain real property in the city of Seattle, was delivered to W. B. Perkins, and on the same day was filed for record, which mortgage will be referred to as the Perkins mortgage. Subsequently this mortgage was assigned and transferred to the Bennington County Savings Bank, the appellant. On June 20, 1916, H. B. Petridge executed and delivered to Rowe France and others a mortgage which included the same property covered by the Perkins mortgage. This mortgage was also filed for record, and will be referred to as the France mortgage.

On the 26th day of December, 1916, the action was brought in the superior court of King county to foreclose the France mortgage. The holder of the Perkins mortgage was a party to the action. The controversy there was one of priority. The Bennington County Savings Bank claimed that its mortgage was superior, and the holders of the France mortgage made a like claim as to their mortgage. In that action it appeared that A. C. Petridge, the son of H. B. Petridge, had signed and delivered the Perkins mortgage without the knowledge or consent of his father. H. B. Petridge testified that he had not signed the Perkins mortgage or authorized it to be signed in his name, and had no knowledge thereof until after he had executed the France mortgage. The trial resulted in a judgment

July 1920]

Opinion Per MAIN, J.

sustaining the priority of the France mortgage. From this judgment, no appeal was prosecuted. Subsequently A. C. Petridge was indicted for forgery for signing his father's name to the Perkins mortgage, tried and convicted. Upon the trial of the criminal action, the father testified that he had authorized his son to sign his name to the Perkins mortgage and that it was done with his consent and approval. The criminal action was appealed to this court, where the judgment of conviction was reversed and the cause remanded with directions to dismiss the action. This holding was based largely, if not entirely, upon the testimony of H. B. Petridge, the father, in the criminal action, to the effect that he had authorized the signing of his name to the Perkins mortgage and that he knew all about it. It thus appears that H. B. Petridge testified one way in the civil action and diametrically the opposite in the criminal action. The complaint charges that the judgment in the civil action was induced by perjured testimony and was, therefore, fraudulent. More than one year elapsed after the entry of the judgment of foreclosure before the present action was instituted.

To sustain the right to maintain this action it is necessary that the complaint allege facts which show that the judgment in the action on the mortgages was induced by fraud. If there were fraud, it was in the fact that H. B. Petridge had testified falsely in that action. It is a settled rule in this state that perjury alone is not an equitable ground for setting aside a judgment obtained on false testimony, in the absence of extrinsic or collateral fraud. *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669; *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490; *Meeker v. Waddle*, 83 Wash. 628, 145 Pac. 967; *Robertson v. Freebury*, 87 Wash.

558, 152 Pac. 5; *Godfrey v. Camp*, 95 Wash. 674, 164 Pac. 210; *Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811.

In the *Robertson* case the question was thoroughly reexamined and the rule of the prior cases adhered to. It was further held in that case that the perjury or false testimony, even if admitted, is not sufficient to relieve a case from the force of the rule. If it be assumed that H. B. Petridge testified truthfully in the criminal action and that, as a result of such testimony, the judgment of conviction was reversed by this court, this amounts to no more than an admission that his testimony in the civil action was false and untrue. The case of *Rowe v. Silbaugh*, 107 Wash. 518, 182 Pac. 576, is distinguishable. There, there was extrinsic or collateral fraud which induced the superior court to assume jurisdiction and render judgment in the case. In that case there was an affidavit of nonresidence which was in fact not true. In both the cases of *Robertson v. Freebury* and *Burke v. Bladine*, *supra*, an excerpt is quoted with approval from *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, wherein there is pointed out what will constitute extrinsic or collateral fraud, one instance being the keeping of the unsuccessful party "in ignorance of the suit." The *Silbaugh* case falls within that class. There the unsuccessful party was kept in ignorance of the suit, even though residing on the land in controversy.

To hold in this case that the false testimony in the civil case constituted fraud, in view of the course taken by the criminal case, and therefore was not within the rule of the cases above cited, would be to make a distinction where no substantial difference exists.

The judgment will be affirmed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15859. Department One. July 12, 1920.]

CARMAN DISTRIBUTING COMPANY, *Respondent*, v.
THE CASCADE LAUNDRY COMPANY,
Appellant.¹

SALES (79)—ACCEPTANCE—DELAY IN REJECTING GOODS. Where the sale of canvas by sample was made on thirty days credit, it was the buyer's duty to inspect the same within such period, and asking an extension of time and delay in inspection from November 8 until January 23 implies an acceptance.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered October 27, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Hamblen & Gilbert, for appellant.

E. H. Belden, for respondent.

MACKINTOSH, J.—The respondent is suing for the value of a roll of canvas sold on October 22, 1918. In defense to the action, the appellant says that the canvas was sold by sample, which was sent from the respondent's place of business in Omaha to the appellant in Spokane, and that the appellant made the sale by telegraphed acceptance, based upon the sample, and that the canvas shipped was not in accordance with the sample. In reply, respondent denied that the canvas was not according to sample, and alleged that the appellant had accepted the canvas by waiting an unreasonable time after its receipt before making objection. The trial court found that the canvas was not according to sample, but permitted a recovery upon the finding that appellant did not refuse the canvas within a reasonable time after its receipt, and its conduct thereby amounted to an acceptance.

¹Reported in 191 Pac. 392.

The evidence shows that, on October 17, 1918, the respondent wrote to the appellant and enclosed a sample of the canvas, which it then offered for sale. On October 22, the appellant wired an acceptance of the offer and ordered the canvas shipped. On October 23, the respondent shipped the canvas, which arrived in Spokane on November 8. According to the offer of October 17, the canvas was sold "strictly thirty days net." Instead of making payment when due, the appellant asked for an extension of time. The respondent demanded payment of appellant from time to time, and on December 16, the appellant asked for an extension of time to January 20, 1919, which request was granted. On January 20, no payment was made, and on January 23, the appellant wrote to the respondent that the canvas was not according to sample; that it had just made an examination for the first time and discovered this situation. The price of canvas had declined between October 22 and January 23. There is considerable testimony in the case upon the question of whether, as a matter of fact, the canvas shipped was the same as the sample, but it is unnecessary for us to determine this phase of the case, and we will accept the trial court's finding for the appellant that the sample of canvas was of different quality from that purchased.

The respondent, however, is entitled to recovery on the ground that an unreasonable delay in rejecting the canvas after its receipt amounted to an acceptance. The sale was made on thirty days' credit, and the duty was upon the appellant, before the expiration of that credit period, to perform the simple act of uncovering the canvas roll and making an inspection to see whether the goods corresponded to the sample. Instead of that, the appellant kept the canvas in its pos-

session from November 8 until January 23 before making an examination, and in the meantime merely asked for an extension of time for payment. It must be held to have accepted the canvas by reason of its unreasonably delayed examination and decision.

The rule is well recognized, as stated in 35 Cyc., pages 227, 229, 239, 243 and 260, that:

"The inspection of the goods regarded as either a duty imposed on the buyer or as a right to be exercised by him should be made within a reasonable time."

"... the option to reject must be exercised and notice thereof given within a reasonable time ..."

"The buyer is estopped to complain of defects in the goods when he had knowledge or notice thereof at the time of sale, or retains the goods after a reasonable time in which to make inspection has elapsed ..."

"... So a failure to reject or return goods within a reasonable time will be construed as an acceptance waiving defects."

"An acceptance of the goods will be implied if the buyer fails within a reasonable time to reject them, or to return them to the seller."

24 R. C. L., page 357, states:

"And since a sale is voidable only at the option of the buyer, to entitle him to rescind he must act promptly on the discovery of the fraud, and if after discovering the fraud he acquiesces in the sale ... by an ... unreasonable delay, he will be deemed to have affirmed the sale and he cannot afterwards rescind ..."

Pence v. Langdon, 99 U. S. 578 (25 L. Ed. 420), states the rule to be:

"Acquiescence and waiver are *always* questions of fact. There can be neither without knowledge. ... But he may not wilfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He

cannot rest until the rights of third persons are involved and the situation of the wrongdoer is materially changed. Under such circumstances he loses the right to rescind and must seek compensation in damages.
 . . .”

In the case at bar, the situation of the respondent had been materially changed by the fall in price. *Grabfelder v. Vosburgh*, 90 App. Div. 307, 85 N. Y. Supp. 633, discussing this question, contains the following:

“If the term of credit had expired before the defendant notified the plaintiff of his declination to accept the goods, probably that would have been, as matter of law, an unreasonable delay in arriving at the decision. Where a specific term of credit is extended upon a sale of goods, accompanied by the representation that they are of a superior quality or of a certain grade, the opportunity of examination should be taken advantage of before the bill becomes due. The credit implies that the conditional sale is to become absolute, at least by the time of the maturity of the account.”

This court, in the case of *Kleeb v. Long-Bell Lumber Co.*, 27 Wash. 648, 68 Pac. 202, held that the first notification by the plaintiff of any objection to the quality of lumber sold, which occurred two months after the sale, was such an unreasonable delay as to amount to an acceptance, the court saying:

“. . . the rule is, where a purchaser keeps goods for an unreasonable time or treats them as his own, he will ordinarily be considered as having ratified the sale. His conduct establishes a presumption that the goods are satisfactory, and by reason of his negligence in seasonably notifying his vendor of his refusal to accept, he cannot deny such acceptance; . . .”
 and, referring to the delay in the case of sixty-four days before the notice of rejection was given, the court further says:

“A reasonable consideration of the distance between plaintiff and defendant, the complete opportunities for

July 1920]

Syllabus.

examination, and the comparatively small stock of lumber received, certainly impresses reasonable persons that the delay was unreasonable. . . . Plaintiff had shipped the lumber a great distance."

Under these authorities, which but express what seems to be the universal rule, the trial court was correct in determining that the appellant's conduct had amounted to an acceptance of the canvas.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, MITCHELL, and MAIN, JJ.,
CONCUR.

[No. 15855. Department One. July 12, 1920.]

In the Matter of the Estate of GEORGE R. WILSON,
WILLIAM CHISLETT, *Appellant*, v. CITY OF SEATTLE
*et al., Respondents.*¹

WILLS (64)—CONSTRUCTION—MISNOMER—EVIDENCE TO EXPLAIN AMBIGUITY. A will bequeathing \$5,000 to each of the following named charitable institutions, naming with two other children's charities, "Tuberculosis Sanitarium, all located in Seattle or King County," there being none officially known by that name, presents such an ambiguity or misnomer as to admit of extrinsic evidence that the city of Seattle operated a free tuberculosis hospital north of the city, some miles from testator's home, popularly known by several designations, one of which was "Tuberculosis Sanitarium," which was the only strictly charitable institution of its kind in King county, and that, at the time the will was executed there was an extensive publicity campaign for the purpose of securing donations for a children's building at such institution; and such evidence warrants the finding that the city institution was intended by the will.

CHARITIES (3)—"CHARITABLE INSTITUTION." A county tuberculosis sanitarium rendering free services, is a "charitable" institution, within the meaning of a will, notwithstanding it is supported by funds raised by taxes.

¹Reported in 191 Pac. 615.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 11, 1920, distributing the estate of a decedent, after a hearing before the court. Affirmed.

Poe & Falknor, for appellant.

Walter F. Meier and *Geo. A. Meagher*, for respondents.

MACKINTOSH, J.—January 27, 1914, Geo. R. Wilson executed his will, one clause of which provided:

"I give and bequeath five thousand dollars to each of the following named charitable institutions: Washington Children's Home Society, Orthopedic Hospital, Tuberculosis Sanitarium, all located in Seattle or King county, Wash. . . ."

On May 26, 1916, the will was admitted to probate, and from the decree of distribution made October 24, 1919, the residuary legatee has appealed, on the ground that the bequest of \$5,000 to the "Tuberculosis Sanitarium" is void for uncertainty, in that no such charitable institution as the "Tuberculosis Sanitarium" existed, or exists, in Seattle or King county. The decree ordered this bequest paid to the city of Seattle, as the owner of a hospital devoted to the care and cure of persons afflicted with tuberculosis.

Unquestionably courts, in the administration of these matters, look with kindness upon legacies and devises made to the use of charity, and rather than allow benevolent intentions to prove abortive, go to the full length of their ability to fulfill them. By § 45, chapter 156, Laws of 1917, we are admonished to have due regard to the direction of the will, and to accomplish the true intent and meaning of the testator. *In re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148; *Peth v. Spear*, 63 Wash. 291, 115 Pac. 164. The intention of

July 1920]

Opinion Per MACKINTOSH, J.

a testator is generally to be gathered from the instrument itself, but where there is an ambiguity, such as the misnomer here, extrinsic evidence is admitted to show the real intent of the testator. Where there is an ambiguity and there is no extrinsic evidence, or the extrinsic evidence does not directly show intent, the bequest fails for indefiniteness and uncertainty. *Bowman v. Domestic & Foreign Missionary Society etc.*, 42 Misc. Rep. 574, 87 N. Y. Supp. 621.

The city claims that the evidence establishes that it was the testator's intention to bequeath to it the \$5,000 for its hospital. It appears that there is no institution in Seattle or King county officially known as the "Tuberculosis Sanitarium," but that, in July, 1912, the Anti-Tuberculosis League of King county, a corporation, then the owner of a tuberculosis hospital, conveyed the institution to the city, which thereafter has operated it, supporting it by general taxation and rendering free service to those receiving its care and attention. In the winter of 1913-14, the Anti-Tuberculosis League was engaged in an extensive campaign of publicity for the purpose of securing donations to be used for the establishment of a building at the city's hospital to be devoted to the treatment of children. Mr. Wilson lived north of the city of Seattle, and the hospital was also north of the city limits, though some miles from his residence. The testimony of several witnesses was to the effect that, in 1914, the city's hospital was popularly known by several designations, such as "Firlands," being the name of its location; "Pulmonary Hospital"; "Pulmonary Sanitarium"; "Tuberculosis Hospital"; "Firlands Hospital"; "Firlands Sanitarium"; "Tuberculosis Hospital at Firlands"; "Firlands Tuberculosis Hospital"; and "Tuberculosis Sanitarium." There existed at the time

but one other hospital for tubercular patients, which was not a strictly charitable institution, in that it charged fees to its patients, although the charges were but sufficient to meet the expense of operation. This institution was popularly known as the "Riverton Tuberculosis Sanitarium," or "Riverton Pulmonary Sanitarium (or Hospital)"; or "Riverton Sanitarium (or Hospital)."

Appellant advances the argument that the city's hospital does not come within the description of the testator of a "charitable institution;" but in this he errs, for, as already adverted to, the services performed are gratuitous, though the source of the maintaining revenue is derived from taxation. The question of whether an institution is a charitable one is determined more by its deeds than by its sustaining methods or motives. A municipality, by tax raised funds, may operate a charitable institution. *People ex rel. State Board of Charities v. New York Society etc.*, 162 N. Y. 429, 56 N. E. 1004; *Russell v. Allen*, 107 U. S. 163; *State ex rel. Olsen v. Board of Control of State Institutions*, 85 Minn. 165, 88 N. W. 533.

The trial court found that the evidence produced for the purpose of identifying the object of the testator's bounty pointed to the city's hospital and established it as the place for which the testator intended his money to be used. To the same conclusion we are impelled. The hospital was quite generally known by the exact description used in the will, and, moreover, the paragraph of the will which we have before us shows that Mr. Wilson was giving to two other organizations which were devoted to the aid of unfortunate and afflicted children. This, taken in connection with the campaign, in progress at the time the will was drawn, for the benefit of tuberculous children, would seem to point unerringly to an intention to include,

July 1920]

Statement of Case.

with the other two recipients, a third which was of the same class, *i. e.*, institutions which were performing charitable services for suffering childhood.

The decree may stand as written.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ.,
concur.

[No. 15726. Department Two. July 12, 1920.]

S. P. GEORGE, *Appellant*, v. PIERCE COUNTY *et al.*,
Respondents.¹

APPEAL (416)—REVIEW—FINDINGS. Findings upon conflicting evidence in an equity case will not be disturbed on appeal unless it can be said that the evidence preponderates against them.

NAVIGABLE WATERS (21)—LANDS UNDER WATERS—ABANDONED CHANNEL—TITLE TO BEDS—AVULSION—BEFORE ADMISSION OF STATE. Where a navigable river changed its course by avulsion over public lands, before the admission of the state into the Union, the bed of the new channel remained in the government and was held in trust for the future state; and the trust title in the old channel thereupon ceased and the new state upon entering into the Union acquired no title thereto.

SAME (21)—ABANDONED CHANNEL—POSSESSORY RIGHTS. The possessory rights of persons upon an old river channel, abandoned before the admission of the state, the title to which was in the government, cannot be questioned by the state which never had any title to the land, and the state can pass none by virtue of river improvements enhancing its value.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 18, 1919, upon findings in favor of the defendants, dismissing an action for an injunction, tried to the court. Reversed.

J. H. Easterday, M. J. Gordon, and J. F. Fitch
(*Carroll A. Gordon* on the brief), for appellant.

William D. Askren, J. A. Sorley, Frank D. Nash,
Fred C. Brown, and Howard Hanson, for respondents.

¹Reported in 191 Pac. 406.

TOLMAN, J.—In the year 1883, or prior thereto, the Puyallup river, at or near the city of Puyallup, by avulsion, made a new channel across the neck of a horseshoe or ox-bow bend in the stream as it had theretofore flowed, and thereafter, perhaps for four or five years, flowed through both the old and the new channel, but with the passing of time the old channel was closed up and the river was confined to the new channel, and long prior to the admission of this state in 1889, the old channel had become more or less filled with silt and alluvial deposits, had grown up to brush and timber, and in part was being farmed and otherwise occupied and put to use. In the year 1889, prior to the admission of the state, the land included in the old channel of the river was platted into lots and blocks, and streets and alleys laid out across the same. Since that time it has been further improved, is now occupied by residences and small farms, and the addition of which it forms a part has been carried on the assessment rolls of Pierce county for thirty years, and general taxes have been levied and paid thereon. Appellant, who was plaintiff below, came into possession of his lands, lying in such abandoned river bed, in 1915, under color of title deraigned by mesne conveyances from the patentee of the surrounding lands above the meander line. His lots are improved with a dwelling house, small factory, fruit trees, shrubbery, etc., and its level is about the same as the neighboring lands outside of the former river bed.

Respondents, King and Pierce counties, acting under authority of chapter 54 of the Laws of 1913 (Rem. Code, § 8145-1 *et seq.*), jointly adopted a plan and proceeded to act thereunder for the purpose of widening and straightening the channel of the Puyallup, Stuck and White rivers, so as to permanently confine the waters of such rivers to their respective channels and

July 1920]

Opinion Per **TOLMAN, J.**

prevent inundation of adjoining lands, and have proceeded to deepen and widen the Puyallup river at points contiguous and adjacent to the land occupied and claimed by appellant, and claim to have so deepened and improved the channel of the Puyallup river as to have prevented it from resuming at some future time the abandoned channel heretofore spoken of, and claim that title to such abandoned channel vested in the state of Washington upon its admission, and was conveyed jointly to King and Pierce counties by virtue of chapter 140 of the Laws of 1915 (Rem. Code, § 8145-12), and the work which the counties have done thereon. In carrying out this theory that they had title to the abandoned channel of the stream, respondents proceeded to appraise the various parcels of lands lying therein, and gave notice that the same would be sold at public auction on a day certain. Thereupon the appellant brought this action upon behalf of himself and others similarly situated, for the purpose of enjoining such threatened sale. A temporary restraining order was entered, but, upon the trial of the cause, the same was vacated and the action dismissed at appellant's costs, and a decree entered quieting title to the premises in question in respondents. From such judgment and decree, appellant has brought the case here for review on appeal.

The trial court found that the Puyallup river is a navigable stream. The evidence upon this point is very conflicting and far from satisfactory, but we cannot say that it preponderates against the findings of the trial court, and must therefore accept that finding as made.

The Puyallup river, being navigable, the general rule is not in doubt. It is thus stated by the supreme court of the United States:

"The conclusions from the considerations and authorities above stated may be summed up as follows:

"Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and control of them are vested in the sovereign for the benefit of the whole people.

"At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

"Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

"The United States, while they hold the country as a Territory, having all the powers both of national and municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interests of the people and

July 1920]

Opinion Per TOLMAN, J.

with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

“Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of the uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States.” *Shively v. Bowlby*, 152 U. S. 1.

This doctrine we have recognized and. followed. *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811; *Hill v. Newell*, 86 Wash. 227, 149 Pac. 951.

This state, acting upon the rule as thus stated, by its Constitution, at once asserted its title to the beds and shores of navigable waters, except as to rights which had become vested, as follows:

“Section 1. Declaration of State Ownership. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in courts of this state.

“Sec. 2. Disclaimer of Certain Lands. The State of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, the same is not impeached for fraud.” Constitution, article XVII.

This declaration by the state must be borne in mind throughout the discussion which follows, for “when

land under navigable water passes to the riparian proprietor, along with the grant of the shore land by the United States, it does not pass by force of the grant alone, because the United States does not own it, but passes by force of the declaration of the state, which does own it, that it is attached to the shore." *Hardin v. Shedd*, 190 U. S. 508.

It has frequently been held, where avulsion or sudden change in the channel of a stream has taken place after the admission of the state or states abutting upon the water course, that such avulsion or sudden change does not change the boundary between the states or divest the title which had theretofore vested in the channel thus abandoned. *Nebraska v. Iowa*, 143 U. S. 186; *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104; Angell on Watercourses, § 57; *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913; *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100.

But it is strenuously contended here that these cases do not apply because, at the time the Puyallup river abandoned its old channel, which the trial court found was in 1883, or prior thereto, the state had not come into existence and had no title to such abandoned channel, and that, when the state was admitted in 1889, the river was flowing in its present channel, had permanently and completely abandoned the old channel, and there passed from the national government to the state title only to its bed and shores as it then flowed.

So far as appears, the new channel when formed was cut from the public lands, and there is therefore no question but that title to such new channel was in the Federal government, and no reason is suggested or perceived why the change of the channel, being permanent, the government's title to such new channel should not thereupon become impressed with the trust

July 1920]

Opinion Per TOLMAN, J.

for the future state to the same extent and effect as though the change had occurred in prehistoric ages, and if so, the trust character of the government's title to the old channel must necessarily have ceased when the trust title in the new channel arose. There could be no reason, in fact or in law, for both titles to persist for the benefit of the future state. The evidences, on every hand in this state of changes in and cessations of water courses and bodies of water which must have been navigable at some time in the past, are such as to call for such a rule as a matter of reason; otherwise, as the statute of limitations does not run against the state, the title to only the mountain peaks would be unassailable. Although there are numerous authorities which hold that, if the change of channels had occurred after the state's title had become vested, then the state's title to the old channel would not have been thereby divested, and we have so held in *Newell v. Loeb* and *Hill v. Newell*, *supra*, yet no authorities bearing on the particular point we are now considering are presented by either side, and our search has revealed none. We therefore rest our opinion purely upon what seems to us to be the logic of the situation.

If, then, we are right in our conclusion that the trust title for the future state in the old channel ceased when the trust title in the new channel arose, what became of the title to the old channel? As the title of the government had been freed from the trust for the future state long prior to its admission, the full and unrestricted title must, therefore, have vested in the government as a part of the public domain, which it could retain or grant or permit to pass to the owner by patent of the abutting uplands under the rule as to accretions, without any further consent from the state

than that contained in the constitutional provision which has been set forth.

Respondents contend that the title of the patentees of the lands abutting upon the old channel did not extend below high water mark, and that, as no grant has since been made by the government, they and their successors can have no title to the land now embraced in such old channel. It would seem that, if the state never had the title to the old channel, and appellant is in possession, as admitted, his possessory rights are sufficient as against respondent's and can be questioned, if at all, only by the government. One of the witnesses, who was brought up on the banks of the Puyallup river at the point in question, testified as follows:

"A. I would say as near as I can guess, it would be about 1876 when it broke through, or possibly—
Q. Since it first broke through has it continued to run in the same channel? A. There were several years, as I recall, until the volume of the water had cut through the new channel. It might have been five years. It kept washing all the time and still running in both channels for a number of years until it filled up the old channel."

On cross-examination:

"Q. You say the water continued to run in both channels? A. It did for a number of years, until the new channel got wiped out. Q. For about how many years? A. I would say, just guessing, four or five. Q. Then it continued to run in both channels until along in 1893 or 1894? A. Oh, no; not that long. Q. About what time? A. It came through possible, that is guess work, about 1876, and it possible might be up until 1880, although at extreme high water it would be backed up in there some. Q. How old are you? A. 52. Q. Would you have any recollection of whether or not it cut through in 1876? A. As near as I can get to it. I recollect the river when it had not broke through and

July 1920]

Opinion Per TOLMAN, J.

I recollect being on the bank of the river and following along at the bank and then it broke through. I was simply estimating the time by how old I was at that time.”

While this testimony is somewhat vague, as it necessarily must be considering the lapse of time, we find nothing in the record which directly or indirectly contradicts it, or tends in any way to lessen its force.

The evidence just quoted tends to support the theory of title by accretion, and if the Puyallup river were a nonnavigable stream, would undoubtedly support such a title. *Denée v. Morrison*, 95 Wash. 76, 163 Pac. 382, and cases there cited. We apprehend, however, that, as the government is not a party here, it is beyond our power now to settle that question, and that it is wholly unnecessary to attempt to settle it in this case.

Respondents further contend that the work which they have performed tends to confine the river to its new channel and lessen the danger of its resuming its flow through the old channel, and while this may be true in a sense, yet, from a careful reading of the whole record, we are not satisfied that the river, before the performance of respondents' work, was any more likely to break out at this point than at any other, and the history of the river for some forty years, as given by the witnesses, convinces us that no such resumption of the old channel was a probability; but in any event, if the state had no title, it could pass none to respondents, however necessary and advantageous their work might have been.

In view of the conclusions reached, we find no necessity for a discussion of the other points raised by appellant.

For the reasons given, the judgment is reversed, with directions to enter judgment permanently enjoin-

ing respondents from interfering with appellant's possession of the property described in his complaint.

HOLCOMB, C. J., MOUNT, FULLERTON, and BRIDGES, JJ., concur.

[No. 15772. Department Two. July 12, 1920.]

LOUIS H. MOORE, *as State Bank Examiner etc.*,
Appellant, v. JOSEPH KILDALL, *Respondent*.¹

BILLS AND NOTES (132)—EVIDENCE (168)—COLLATERAL AGREEMENT LIMITING LIABILITY—PAROL EVIDENCE. In the absence of fraud or mistake, the principal maker of a promissory note cannot set up an independent collateral agreement limiting or exempting him from liability.

BILLS AND NOTES (7)—CONSIDERATION—SUFFICIENCY. There is sufficient consideration for a note to a bank, where it was given in settlement of the indebtedness of a corporation in which the maker was interested and the maker was to receive the balance due after collateral securities of the corporation had been sold by the bank.

SAME (7)—CONSIDERATION—ESTOPPEL. After the insolvency of a bank, the makers of a promissory note given as "live paper" to deceive the bank examiner, is estopped to allege want of consideration.

Appeal from a judgment of the superior court for King county, Grimshaw, J., entered July 19, 1919, upon findings in favor of the defendant, in an action on contract, tried to the court. Reversed.

C. H. Winders, for appellant.

MOUNT, J.—This action was brought by the state bank examiner, in charge of and liquidating the German-American Mercantile Bank, an insolvent state banking corporation, to recover a balance due upon a demand promissory note in the sum of \$3,240.45, executed by the defendant to the German-American Mer-

¹Reported in 191 Pac. 394.

July 1920]

Opinion Per MOUNT, J.

cantile Bank on September 25, 1916, and for the foreclosure of certain collateral securities. The defense was, in substance, that there was no consideration for the note and that, at the time the note was executed, an oral agreement was entered into between the maker of the note and the president and cashier of the bank that the maker should not be required to pay the note, but that the bank would foreclose certain described collateral security and, after deducting the amount of the note, turn the balance of the proceeds over to the maker of the note. On these issues the case was tried to the court without a jury, and resulted in a judgment in favor of the defendant. The plaintiff has appealed.

Upon the trial of the case, over the objection of the appellant, the respondent testified, among other things, as follows:

"Mr. Carstens and Mr. Riley called me up to the bank and they wanted to discuss this Kildall Fishing & Packing Co. business, and they would like to have me put it in some kind of shape so that they could handle it and carry it along without being past due paper, and I says, 'Well,' I says, 'I don't owe the indebtedness; I don't see how I can fix it up.'

"Then Mr. Carstens says, 'Well,' he says, 'you can handle these matters—these securities better and get something easier out of it than we can.' 'Well,' I says, 'Mr. Carstens, the securities are all right, they are worth a great deal more than the indebtedness to the bank.' . . .

"Well, then Mr. Carstens and Mr. Riley were both present, and he said, 'Well, now, you better give your note for this and let us carry that on this security, in order to have live paper, and we will carry it on an indefinite period for you and you pay the interest and you get the security.' So I stated, 'I don't want to give my note and obligate myself in a way where it is going to work a hardship on me,' I said, 'I consider the securities is worth considerable, and will be,' and

we discussed it pro and con, and finally I said, 'Now, I will tell you what I will do; if you will agree to foreclose on this stock and on the tide land lease and take care of the Buckley bank's in addition to it, so that I can get all this property back, I will give my note, if you carry it so that it won't bother me to pay it eventually, but you are to foreclose on all that security and get it back to me.' And Mr. Carstens says, 'That will be all right, Kildall,' he says, 'that will be much better for us to carry it that way, and of course we have been doing business with you and depend upon you in these matters, and I would like to have it in that shape.' 'Well,' I says, 'with that understanding, I will give you my note'."

Based upon this testimony, the trial court was of the opinion that the respondent did not owe the note and, apparently for that reason, made findings and entered judgment in favor of the respondent.

The Mr. Carstens and Mr. Riley referred to in this evidence were president and cashier, respectively, of the German-American Mercantile Bank at that time. The appellant argues that the court erred in admitting this testimony. This contention must be sustained. This court in a number of cases has stated the rule to be in cases of this kind that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability. He is bound by the terms of his obligation. *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751. A number of cases are there cited to that effect.

In the case of *Bank of California v. Starrett*, 110 Wash. 231, 188 Pac. 410, in discussing this question, we said:

"By the terms of the negotiable instruments act, an accommodation party to a note is primarily liable thereon. His engagement is to pay the note according

July 1920]

Opinion Per MOUNT, J.

to its tenor, and is so holden to the payee even if, at the time of taking it, the payee knew he was but an accommodation party. Rem. Code, §§ 3420, 3551, 3582. While the rule is not uniform even in those states which have adopted the negotiable instruments act, it is generally held that a contemporaneous parol agreement limiting the liability of such a maker, or fixing a collateral source of payment, is not available as a defense. Such was our holding in *Van Tassel v. McGrail*, 93 Wash. 380, 160 Pac. 1053, where a number of our cases to the same effect will be found collected. See, also, *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. 1127. To permit the agreement pleaded to be shown would, therefore, be a violation of the parol evidence rule as we have heretofore announced it."

The defense pleaded was, therefore, insufficient, and the evidence offered in support of that defense was erroneously admitted.

The record shows that there was sufficient consideration for the note. The respondent executed the note in question in place of an indebtedness owing by the Kildall Fishing & Packing Company to the bank. The security referred to had been deposited by the Kildall Fishing & Packing Company with the bank as security for the payment of its indebtedness to the bank. The respondent here was the president of the Kildall Fishing & Packing Company and, we think the record shows, was an indorser upon its notes. But whether he was an indorser or not, according to his own evidence, he executed this note to the bank in settlement of the indebtedness of the Kildall Fishing & Packing Company and was to receive therefor the balance due after the securities of the Kildall Fishing & Packing Company had been sold. This of itself was a sufficient consideration for the note. If the note was given as "live paper" to make an appearance of assets so as to deceive the bank examiner, as is intimated by the

testimony of the respondent above quoted, "It has been held that the receiver, representing the creditors, could maintain the action, and the makers were estopped upon the insolvency of the bank to allege want of consideration." *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273. It follows, therefore, that, since there was sufficient consideration and an estoppel to deny consideration, and since the oral agreement could not be taken into consideration, the trial court should have entered judgment upon the note.

The judgment appealed from is therefore reversed, and the cause remanded with instructions to enter judgment as prayed for in the complaint.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15718. *En Banc*. July 12, 1920.]

D. H. KING, *Plaintiff*, v. J. M. BLICKFELDT *et al.*,
Defendants, TITLE TRUST COMPANY *et al.*,
Appellants, OTIS ELEVATOR COMPANY,
Respondent.¹

FIXTURES (8, 9)—AS SUBJECT OF MECHANICS' LIENS—VENDOR AND VENDEE—MORTGAGEES AND SUBSEQUENT LIENORS. An elevator installed in an apartment building under a conditional sales contract with the owner of the premises reserving title to the elevator in the elevator company until fully paid for, although personality as between the parties, becomes a fixture, as the parts are attached to the building, as to a mortgagee for future advances and other liens furnishing labor and material for the building, where the mortgage advances and other lien claims arose contemporaneously with the installation of the elevator without notice of the conditional sales contract, which was not recorded; the circumstances being such as to warrant a belief that the elevator was becoming a part of the building without resort to other protection than the personal liability of the owner and the right to a lien against the building.

¹Reported in 191 Pac. 748.

July 1920]

Opinion Per PARKER, J.

SAME. In such a case, the fact that the elevator company, upon completing installation of the elevator, retained possession of the reverse lever controlling its operation, does not show non-delivery of the elevator, preventing passing of the title, since the parts became attached to the realty as fixtures as the same were attached to the building.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 21, 1919, in favor of one defendant, adjudging the priority of a claim of title to property sold under a conditional sales contract, in an action to foreclose mechanics' and materialmen's liens. Modified.

Jones, Riddell & Brackett and Roberts & Skeel, for appellants.

Bogle, Merritt & Bogle, for respondent.

PARKER, J.—This action was commenced in the superior court for King county to foreclose a number of mechanics' and materialmen's liens held by the plaintiff, King. Our present inquiry has to do only with the mortgage lien claim of the defendant and cross-complainant Title Trust Company, and the mechanics' and materialmen's lien claims of the defendants and cross-complainants Inlaid Floor Company and Seattle Marble and Tile Company, as against the claim of title made by the defendant and cross-complainant Otis Elevator Company under a claimed conditional sale of the elevator installed by it in the building in question. A trial in the superior court upon the merits, adjudicating the rights of all these parties as well as others, resulted in a decree sustaining the claim of title made by the Otis Elevator Company to the elevator in question as superior to these mortgage and lien claims. From this disposition of the cause, Title Trust Company, Inlaid Floor Company, and Seattle

Marble and Tile Company have appealed to this court.

On September 20, 1917, Otis Elevator Company entered into a written contract with the Real Property Investment Company, the owner of the real property in question, situated in the city of Seattle, by which it agreed to furnish, erect and install in the building then in course of construction upon the property, a passenger elevator. The contract, which was in the form of a proposal and acceptance, contained, among other stipulations, the following:

“We are to retain title to and possession of all machinery, implements and apparatus furnished by us under terms of this proposal, until final payment shall have been made.”

This contract was never filed in the office of the county auditor as a conditional sale contract, nor did any of appellants have any actual knowledge of its existence until after each of their lien claims accrued. This work of erecting and installing the elevator in the building was commenced by the elevator company on December 15, 1917, which work continued until near March 19, 1918, when it had been completed and was approved by the supervising architect. The furnishing and installation of the elevator not being paid for as agreed upon, the elevator company claimed title to the elevator and the right to remove it from the building, freed from the mortgage and lien claims of appellants.

On December 6, 1917, Real Property Investment Company conveyed by deed, absolute in form, the lots and the building thereon then in course of construction to Title Trust Company, which deed was duly recorded in the office of the auditor of King county on the following day. This deed was intended as a mortgage to secure a loan of \$20,000 agreed to be made by Title Trust Company to Real Property Investment Com-

July 1920]

Opinion Per PARKER, J.

pany. This loan was consummated in part only, the Real Property Investment Company receiving from Title Trust Company only the following amounts thereon at the times mentioned: On December 13, 1917, \$3,000; on December 30, 1917, \$500; on January 2, 1918, \$500; on January 17, 1918, \$500; on February 2, 1918, \$800, and on February 9, 1918, \$3,000, in all \$8,300, which, together with the interest accruing thereon, was the amount for which the trial court awarded foreclosure in favor of Title Trust Company, but subject to the right of the elevator company to remove the elevator from the building, freed from the claims of Title Trust Company under its mortgage. This period, it will be noticed, was substantially contemporaneous with the period of the erection and installation of the elevator.

On December 20, 1917, the Seattle Marble & Tile Company, in pursuance of a contract made in behalf of the owner of the property with them, commenced to furnish and put in place the marble in the vestibule of the building, which furnishing of material and work continued to, and was completed on or about, February 27, 1918. This period, it will be noticed, was substantially contemporaneous with the erection and installation of the elevator in the building. The superior court decreed foreclosure of the lien of the Seattle Marble & Tile Company for the unpaid balance due them, subject, however, to the right of the elevator company to remove the elevator as its absolute property.

On February 2, 1918, Inlaid Floor Company, in pursuance of a contract entered into by them with the owner of the building, commenced to furnish material for and lay floors in the building, which furnishing of material and work continued until March 26, 1918.

This period, it will be noticed, was contemporaneous with about the latter half of the period of the erection and installation of the elevator in the building. Foreclosure of the lien of Inlaid Floor Company for the balance due them was awarded by the decree, subject, however, to the right of the elevator company to remove the elevator as its absolute property.

Our principal inquiry being as to whether or not the elevator, upon its installation in the building, became such a fixture as to become a part of the realty as between the elevator company and appellants, there being no agreement between them, nor any agreement between the owner and the elevator company of which they had notice, as to the elevator plant remaining the property of the elevator company, and therefore personal property until paid for, it becomes necessary for us to note the relation of the elevator to the general use of the building, what the elevator plant consisted of, and the manner of its physical attachment to the building and the ground upon which it rests. The building is an apartment house of five stories, all of which the elevator was designed to serve. There was built into the building as a part of its original construction a permanent shaft for the elevator. One could hardly say that the elevator plant was of a special or peculiar type, or that, as to most of its parts, such as the car, cables, counterweights, etc., they were made especially for installation in this particular plant. Indeed, most of its parts, viewed separately, could well be classed as stock parts. However, in its installation there was constructed as a part of the plant a concrete foundation in the basement, on which the engine or motor rested and was firmly fastened; the guideposts running up the sides of the shaft, both for the car and the counterweights, were firmly fastened to the build-

July 1920]

Opinion Per PARKER, J.

ing; and there were also other parts of the plant physically attached to the building. Indeed, it was installed and attached to the building, generally speaking, in a manner quite familiar to everyone who has occasion to visit such buildings. In all outward appearances it seems to be as much a permanent fixture and a part of the building, and as necessary to the ordinary efficient use of the building, as any other permanently constructed part of the building. One buying the property from the owner, or one taking a mortgage on the property from the owner, or one performing labor and furnishing materials for which he would have a lien upon the property would, we think, without question, assume from all outward appearances, he having no knowledge of any special agreement or understanding existing between the owner and the one who installed the elevator plant, that it was a permanent fixture and a part of the realty to which he could look as part of his security.

If this were a controversy between the owner of the building and appellants, the former claiming the elevator plant to be personal property and not a part of the realty, and the latter claiming the plant to be a fixture and a part of the realty subject to their mortgage and lien claims, we would have little hesitancy in holding the plant and all its parts to be a fixture and subject to appellants' mortgage and lien claims. Whatever seeming conflict there may be in the holdings of the courts touching the question of what are fixtures under the varying circumstances of the numerous cases, we know of no holding which would lend substantial support to the claim of this elevator being other than a fixture and a part of the realty, as between the owner of the building and appellants. The reason-

ing of our own decisions, even those holding that the particular property involved was not a fixture, is all but conclusive in support of this view of the law. *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744; *Wade v. Donau Brewing Co.*, 10 Wash. 284, 38 Pac. 1009; *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834. On the other hand, if it were a controversy between the owner of the building and the elevator company as to whether or not the elevator plant is personal property as between them, we would as readily hold it to be personal property, since by their express agreement that title should remain in the elevator company until the purchase price was paid in full, they impliedly agree that, as between them, it should be regarded as personal property until paid for. *Boeringa v. Perry*, 96 Wash. 57, 164 Pac. 773.

We would also hold the elevator plant to be personal property, even as between the elevator company and appellants, if it were shown that the latter had knowledge of the agreement and understanding in that behalf made between the owner and the elevator company. *Allis-Chalmers Mfg. Co. v. Ellensburg*, 108 Wash. 533, 185 Pac. 811. These considerations, while falling short of solving our present problem, nevertheless furnish us a starting point, since we are to determine whether or not appellants are in as favorable a position, as against the claim of the elevator company, as subsequent purchasers or incumbrancers for value and without notice of the claim of the elevator company.

Generally speaking, we think it may safely be said that an agreement between the owner of realty and the owner of the personal property sold by the latter to the former to go into the realty under such conditions

July 1920]

Opinion Per PARKER, J.

as to its relation to the realty as would under ordinary circumstances clearly make it a fixture and a part of the realty, may be effective to preserve the personal status of the property so sold and prevent it becoming a fixture and a part of the realty, even against prior incumbrancers; providing the material or thing so sold and going into the realty could be removed therefrom without material damage thereto impairing the security of the prior incumbrancer. On the other hand, generally speaking, we think it may safely be said that an agreement between the owner of realty and the owner of the personal property sold by the latter to the former to go into the realty under such conditions as to its relation to the realty as would under ordinary circumstances clearly make it a fixture and a part of the realty, will not preserve the personal status of the material or thing so sold and going into the realty and prevent it becoming a fixture and a part of the realty, as against subsequent incumbrancers who have no notice, until after the accrual of their claims, of the agreement by which the owner of the realty and the owner of the personal property assumed to preserve the personal status of the latter and prevent it becoming a fixture and a part of the realty. These considerations do not quite solve our present problem; but they constitute, we think, another step in that direction, since we have seen that the advancing of the \$8,300 by appellant Title Trust Company to the Real Property Investment Company, secured by the mortgage in pursuance of the loan agreement between them, and the furnishing of work and material by the other appellants upon which their lien claims rest, were all substantially contemporaneous with the construction and installation of the elevator plant by the elevator company. So the question still remains: Are the appel-

lants in the position of subsequent incumbrancers for value and without notice of the agreement between the Real Property Investment Company and the elevator company by which they assumed to prevent the elevator plant becoming a fixture and a part of the realty until paid for? No decision has come to our notice dealing with the rights of purchasers or incumbrancers whose rights as such accrued contemporaneously with the fixtures going into and becoming a part of the realty. However, the reasoning of the decisions wherein there has been considered the rights of both prior and subsequent incumbrancers to look to the fixtures as part of the realty, we think will materially aid us in this inquiry.

In *Wade v. Donau Brewing Co.*, 10 Wash. 284, 38 Pac. 1009, there was involved the question of refrigerating machinery becoming a fixture and a part of the realty of a brewing plant, which machinery was placed in the plant at the instance of the owner, under an express agreement that it should remain the property of the manufacturing company placing it there until it was paid for. The controversy was between the plaintiff, Wade, in the foreclosure of his mortgage, and the manufacturing company so furnishing the machinery, he claiming that the machinery had become a fixture as to him, he being ignorant of the agreement between the owner and the manufacturing company, and that he was in effect a subsequent mortgagee. A considerable part of the machinery was placed in the plant after the execution of the mortgage, but apparently all of it was placed there before the bonds which the mortgage was executed to secure were actually issued. It was held that, as to Wade and his rights under his mortgage, he was, in legal effect, a subsequent mortgagee, and that the prior agreement

July 1920]

Opinion Per PARKER, J.

as to the personal status of the machinery after its installation in the plant did not, as to his mortgage rights, prevent the machinery becoming a fixture, and therefore as much a part of his security as all other portions of the realty. That case, it will be readily noticed, dealt with a situation wherein the dividing line between prior and subsequent incumbrancers was approached almost as closely as the situation we are here considering.

In *German Savings & Loan Society v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267, there was involved the question of whether or not windows, doors, sashes, frames and wainscoating, placed in a building with the express understanding between the one furnishing such material and the owner that it should remain the property of the former until paid for, became fixtures and a part of the realty, subject to the lien of a mortgage loan on the realty fully executed prior thereto. It was held that, as between the owner and the one furnishing the material, it did not become fixtures, and that the title thereto remained in the latter until paid for, since they in effect agreed that it should remain personal property. It was also held that the material did not become fixtures, it not being paid for, even as to the mortgagee, the theory of the decision manifestly being that the mortgagee lost none of his security by giving effect to the agreement between the owner and the one furnishing the material, in view of the fact that the material could be removed without injury to the realty, leaving the mortgage security undiminished from what it was when the mortgage was given. The reason of that decision and the review of the authorities therein cited is of material aid here as emphasizing the thought that the most important inquiry in such cases is, Did the incumbrancer,

when he acquired his security, have a right, in the light of his then knowledge of the premises, to rely upon the assumption that the particular part of the building in question was a fixture and a part thereof?

In *Boeringa v. Perry*, 96 Wash. 57, 164 Pac. 773, there was involved a chattel mortgage upon pipes in the ground used for irrigation purposes; the only title of the mortgagor in the land being that of an entryman upon government land. He thereafter lost his right to perfect his entry of the land, it being thereafter filed upon by another entryman. The controversy over the mortgagee's right to the pipes arose upon his attempted foreclosure and removal of the pipes as against the second entryman. It was held that the mortgage could be foreclosed as against the second entryman, in view of the fact that he was not a subsequent purchaser of the land for value, so far as the pipes were concerned, and that they could be removed without material injury to the land.

In *Allis-Chalmers Mfg. Co. v. Ellensburg*, 108 Wash. 533, 185 Pac. 811, a conditional sale contract of material in the form of equipment for an electric power plant for the city, which sale of equipment was made to the contractor, in which it was agreed that the title to the equipment so furnished should remain in the seller until paid for, was recognized as binding upon the city, it having actual notice of the existence of the contract at the time of the installation of the equipment, and the seller was held to have the right to remove the equipment from the plant unless the city should pay therefor as agreed by the contractor, who had abandoned the work.

These decisions come as near touching our present problem as any to be found in our own reports, and they are of aid here only in a general way. We now

July 1920]

Opinion Per PARKER, J.

notice some decisions from other states, the reasoning of which at least, we think, will throw more light upon our present inquiry. In *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. 889, we have a decision which counsel for respondent elevator company particularly rely upon, and we agree with them that it is one of the leading cases in this country touching the question here presented. The substance of what was there involved and the holding of the court is well stated in the syllabus to the official report of the decision as follows:

“A vendor of an engine, boiler and machinery, knowing that they were to be annexed to real estate, took a chattel mortgage upon them for a part of the price, but failed to register it. The mortgagor of the chattels afterwards annexed them to real estate upon which he had already given a mortgage.—*Held*, that the lien of the chattel mortgagee should be protected, so far as it would not diminish the security which the real estate mortgagee would have had if the annexation had not been made.”

Of course, if these appellants are prior incumbancers in that their rights as such accrued before it can be said that the elevator plant or any part of it became attached to the realty, the holding of that case, as well as some of our own already noticed, would be decisive against them. But the reasoning of that decision, as does some of our own, we think, lend support to the contentions here made in appellants' behalf, in view of the arising of their rights contemporaneous with the installation of the elevator plant. In that decision we read:

“As between a lienor who consents to have the subject-matter of his lien transmuted into a shape by which subsequent purchasers and mortgagees are liable to be subjected to deceptive dealings, there seems to be no equitable ground upon which the lien

should be recognized against an innocent subsequent mortgagee or purchaser for value. The entire spirit of our registry acts is opposed to the notion that, in such a juncture of affairs, the real estate purchaser would not be regarded as a *bona fide* purchaser against whom the chattel mortgage would be void. But, as already observed, the real estate mortgagees, in the present case, held their lien before the attachment to the realty of the mortgaged chattels. It is true that by force of annexation they would become subjected to the lien of the real estate mortgage absolutely, unless the lien of the chattel mortgagee intervenes. Any property belonging to the mortgagor, which he chooses to annex to the mortgaged premises, becomes realty. But it is difficult to perceive any equitable ground upon which the property of another, which the mortgagor annexes to the mortgaged premises, should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance at the time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long therefore as he is secured the full amount of the indemnity which he took, he has no ground for complaint. There is therefore no inequity towards the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels, in protecting the lien of the latter to its full extent so far as it will not diminish the original security of the former."

As to the law touching the rights of subsequent purchasers and incumbrancers, in the note to *Lawton Pressed Brick & T. Co. v. Ross-Kellar T. P. B. M. Co.*, 33 Okla. 59, 124 Pac. 43, 49 L. R. A. (N. S.) 396, the editor says:

"With the exception of the decisions alluded to, it seems to have been unanimously held that the rights

July 1920]

Opinion Per PARKER, J.

of a purchaser of the realty without notice of the claim of the seller of fixtures are unaffected by the latter's retention of the title thereto, or reservation of a right to retake them upon default in payment of the purchase price."

The decisions which he notes as exceptions, and holding contrary to what seems to be the almost unanimous weight of authority, are the case to which the note is appended, and certain early New York cases. A number of decisions are cited in support of this statement of the learned editor, among which are the following: *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542, 163 N. E. 33; *Ridgway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714; *Knowlton v. Johnson*, 37 Mich. 47; *Case Mfg. Co. v. Garven*, 45 Ohio 289, 13 N. E. 493.

Now are these appellants in as favorable position in asserting that, as to them, this elevator plant is a fixture and a part of the realty subject to the satisfaction of their mortgage and lien claims, as if they were subsequent purchasers or incumbrancers in the sense that their mortgage and lien claims were wholly subsequent in time of their inception to the actual completion of the elevator plant and all of it becoming a part of the building as a fixture? We think that the reason of the law calls for a holding that they are. This elevator plant did not become attached to and a permanent part of the building at any one instant of time, but it became attached by progressive stages while the advancements were being made upon the mortgage and work done and material furnished and placed in the building by appellants at substantially the same rate of progress. While appellants were advancing money upon the mortgage and were performing labor and furnishing material in the construction of the building, they saw the elevator plant steadily

becoming a part of the building, we think, under such circumstances and conditions as to warrant each of them assuming that the elevator plant and its several parts was becoming a fixture or fixtures in the building as its installation progressed. They had every reason to believe that the elevator company was looking for protection only to the personal liability of the owner or to its lien right against the building and the realty of which the elevator was becoming a part; just as appellants were looking for their protection to their mortgage and lien rights against the building and the realty of which the elevator was contemporaneously becoming a part.

Some contention is made in respondent's behalf rested upon the theory that the elevator plant was never actually completed and that possession thereof was and is retained by respondent. Just before the supervising architect certified to the completion of the building and elevator plant, the running of the elevator was tested by the parties concerned and found to be completed and in good running condition. Thereupon an agent of the elevator company took away with him the so-called reverse lever, the use of which was necessary to the starting and stopping of the elevator. This was an insignificant part of the elevator as a whole. This, it is insisted, was a retaining of possession of the elevator by the elevator company, from which it is argued that the elevator has never passed out of its possession, and is therefore not yet a fixture in the building. We think this position is wholly untenable. Neither the building nor the elevator is in the physical possession of the elevator company. Of course, it may well be said that no part of the elevator became a fixture and a part of the realty until it in law passed out of the possession of the elevator com-

July 1920]

Opinion Per PARKER, J.

pany, but we think each part of the elevator as it became permanently installed passed out of the possession of the elevator company, and that it is not necessary to fix the parting of such possession from the elevator company as to the whole of the plant at any particular time. Its several parts were constantly passing out of the possession of the elevator company, just as the advances made by Title Trust Company upon the mortgage and the material furnished by the other appellants passed out of their possession. Counsel calls our attention to the agreement retaining title in the material involved in *German Savings & Loan Society v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267, which agreement provided for not only the retaining of title, but possession of the material furnished by the owner furnishing it until it was paid for. We have no such agreement here, and besides the retaining of possession, if such be the effect accruing in that controversy, was wholly foreign to the theory upon which that case was decided, which was simply that the mortgage was held inferior to the property right of the one furnishing the material under a contract reserving title to the property in him, because the mortgage was executed and the debt which it secured created long before the furnishing of such material, and the removal of the material would not in the least impair the mortgagee's security.

We have mentioned the fact that the contract between Real Property Investment Company and the elevator company, agreeing that title should remain in the latter until the elevator should be paid for, was never filed in the office of the county auditor as a conditional sale contract, merely for the purpose of making it plain that the question of constructive notice is not here for our consideration. We do not want to be

understood as intimating any opinion as to whether or not such filing of the contract would have required appellants to have noticed it and rendered it effective as against them.

We feel constrained to hold that the decree of the trial court should be modified so that appellants Title Trust Company, Inlaid Floor Company, and Seattle Marble & Tile Company shall be awarded foreclosure of their mortgage and lien claims as against the elevator plant as a part of the realty, and that the claim of property made by the elevator company in the elevator plant should be held for naught as against these mortgage and lien claims. It is so ordered, and the case is remanded to the trial court with directions to correct its decree accordingly.

HOLCOMB, C. J., TOLMAN, FULLERTON, MITCHELL, MACKINTOSH, and BRIDGES, JJ., concur.

July 1920]

Opinion Per MACKINTOSH, J.

[No. 15645. Department One. July 13, 1920.]

THE STATE OF WASHINGTON, *Appellant*, v.
E. V. THOMPSON, *Respondent*.¹

GAME—CREATION OF OPEN SEASON—POWERS OF GAME WARDEN—STATUTES—CONSTRUCTION. Under Laws of 1917, p. 166, § 3, by which the seasonal pursuit of blue grouse in Columbia county is absolutely withdrawn and made unlawful, the state game warden has no power to grant the county game commission authority to open a season, by virtue of Id. p. 166, § 1, subd. 9, which provides that the state game warden may grant permission to "shorten, close or open the season" on any upland birds; it not being the intention to grant power to "open" a season where no seasonal regulation is provided or to lengthen any season created by the act.

CONSTITUTIONAL LAW (32)—DELEGATION OF LEGISLATIVE POWERS. To construe the game laws to authorize the state game warden and county game commissioners to allowing the killing of blue grouse in Columbia county contrary to express statutory enactment, would confer upon them legislative functions and render the act unconstitutional.

Appeal from a judgment of the superior court for Columbia county, Mills, J., entered September 23, 1919, upon sustaining a demurrer to the information, dismissing a prosecution for violating the game laws. Reversed.

The Attorney General, A. F. Appleton, and Roscoe R. Fullerton, for appellant.

E. V. Thompson, for respondent.

MACKINTOSH, J.—The respondent was charged with the offense of having killed three blue grouse in Columbia county, this state, on September 14, 1919, and upon his demurring to the information, an order was entered sustaining the demurrer and dismissing the action, from which order the state has appealed.

¹Reported in 191 Pac. 620.

Subdivision 9, § 1, ch. 164, p. 760, Laws of 1917, is:

"Upon written application by the full membership of any county game commission to the state game warden, permission may be granted by the state game warden to shorten, close or open the season on any of the upland game birds of the state, in their respective counties . . ."

Section 3, ch. 164, p. 762, Laws of 1917, is:

"Every person who shall within the state of Washington, hunt, pursue, take, kill, injure, destroy or possess any . . . blue grouse, . . . or any species of upland game birds, except as herein provided, shall be guilty of a misdemeanor: . . . *Provided, further,* That in the counties lying east of the summit of the Cascade mountains, except in the counties of . . . and Columbia, it shall be lawful to hunt, take, kill and possess . . . blue grouse between the first day of September and the fifteenth day of November, both dates inclusive, of the same year."

The information shows that, in pursuance of an application from the full membership of the Columbia county game commission, the state game warden had granted permission to the county game commission to open a season for blue grouse in Columbia county, and that the commission, pursuant to that authority, had declared it lawful to hunt blue grouse from September 1 to November 15, 1919. By § 3 of the foregoing chapter, the seasonal pursuit of blue grouse in Columbia county is absolutely withdrawn. No open season for those birds in that county was provided. It is claimed that, by subd. 9, § 1, above, the county game commissioners and the state game warden might create an open season under the power granted in that subdivision to "shorten, close or open" the season. The power to "shorten, close or open" is capable only of application to seasonal hunting, but where, as

July 1920]

Opinion Per MACKINTOSH, J.

here, such hunting is absolutely prohibited by the complete withdrawal of seasonal regulation, the argument advanced by the respondent, if admitted, necessarily involves what would be in effect the creation of a season, rather than the regulation of a season, by "shortening, closing or opening," already instituted by the legislature. To so hold would leave it within the power of the state game warden to make lawful the taking of game in all cases where the statute specifically declares such taking unlawful. Subdivision 9 must be so interpreted as not to nullify other provisions of the act, unless such interpretation is necessary and the other portions of the act are clearly inconsistent with that subdivision. By interpreting the word "season" as meaning a period of time created by the legislature for the pursuit of game, the entire act is rendered harmonious and its effective administration is materially assisted. The words "close" and "open" should be considered together with the word "shorten," so that the subdivision would read to mean that the state game warden may, upon conditions provided in the subdivision, shorten a season already created by the legislature by closing or opening it at times other than those specifically enacted, but that the power is not granted to open seasons where no seasonal regulation whatever is provided, or to lengthen the time of a season duly created by the act. The executives of the state game code cannot be delegated legislative powers, but may be granted authority to determine the expediency of the application of the act to changing local conditions controlled in general by the act. The state game warden may determine some fact or state of circumstances upon which the operation of the law depends. *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938.

Giving subdivision 9 the construction that would empower the state game warden and county game commissioners to allow the killing of blue grouse in Columbia county, contrary to the express provision of § 3, would be to confer upon them the functions of the legislature and render the subdivision unconstitutional. The construction which we have here determined leaves the section free from objections to its constitutionality and harmonizes it with the other express provisions of the act.

We cannot agree with the respondent that, if the county game commission and state game commission have authority to open the season under subdivision 9, the same authority would carry the power to declare an open season. The authority given to "shorten, close or open" is, as we have already indicated, merely an authority to shorten, and to declare the opening and closing as shortened, of hunting not withdrawn from seasonal regulation. The demurrer should have been overruled.

Judgment reversed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ.,
concur.

July 1920]

Opinion Per PARKER, J.

[No. 15897. Department One. July 13, 1920.]

ARCHIE B. NOYES, *Respondent*, v. SCHOICHIRO KATSUNO,
Appellant.¹

MUNICIPAL CORPORATIONS (383, 391)—STREETS—COLLISION—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The driver of a taxicab which was on the right side of the street near the curb is not guilty of contributory negligence in suddenly turning to the left to avoid a head-on collision with an auto truck which was approaching on the wrong side of the street at a high rate of speed and cutting a corner, where there was no room to turn to the right and his passengers were in great peril.

Appeal from a judgment of the superior court for King county, Hall, J., entered July 29, 1919, upon findings in favor of the plaintiff, in an action for damages to personal property, tried to the court. Affirmed.

William U. Park and *Paul S. Dubuar*, for appellant.
Totten & Totten, for respondent.

PARKER, J.—Plaintiff, Noyes, seeks recovery of damages which he claims to have suffered from injuries to his taxicab automobile caused by the negligence of Katsuno, in that the latter negligently drove his auto truck so as to cause it to come into collision with the plaintiff's automobile at the intersection of Brintnall Place and Fifteenth avenue northeast, in the city of Seattle. A trial in the superior court for King county sitting without a jury, resulted in findings and judgment in favor of the plaintiff, awarding him recovery against the defendant in the sum of \$300, from which the defendant has appealed to this court.

Brintnall Place is a street running in a westerly and easterly direction. Fifteenth avenue comes into it from the north. These two streets, in so far as the

¹Reported in 191 Pac. 419.

general course of travel thereon is concerned, are much like one continuous street with a bend at the place in question, forming an angle of about 100 degrees. The paved roadway of Brintnall Place at and just east of the intersection is thirty-eight feet wide. The paved roadway of Fifteenth avenue is twenty-five feet wide. At the time in question, respondent, Noyes, was driving his automobile westerly along Brintnall Place, approaching Fifteenth avenue with a view to turning north in that avenue. He was returning from a funeral and had several passengers in his automobile. His automobile and the truck of appellant, being driven by himself, came into collision in the intersection of the two streets.

Respondent claims that he was driving at the rate of seven or eight miles per hour, close to the curb of Brintnall Place, and well within the north half of the paved roadway when he approached the northeasterly corner of the street intersection; that, when he arrived within a few feet of the corner, he saw appellant's truck coming at a high rate of speed, twenty or twenty-five miles per hour, turning from Fifteenth avenue into Brintnall Place, and cutting across the corner directly towards his (respondent's) automobile; that it instantly became apparent to him that there was going to be a collision between the two automobiles unless he turned either to the right or to the left; that he could not turn to the right and escape the impending collision because there would not be room between the curb and the course of appellant's truck to safely pass and avoid such collision; that, finding himself and his passengers in such a position of sudden peril, he turned his machine to the left and stepped on the accelerator with a view to speeding up and allowing the truck to pass to his right, the course which it was manifestly taking at such a high rate of speed; that

July 1920]

Opinion Per PARKER, J.

appellant, an instant later, turned to his right, and the two machines came together on the south side of the roadway not far from the south curb thereof. This is the substance of respondent's version of the accident as told in his testimony. It is corroborated in most of its material particulars by one of his passengers, who seems to have been a disinterested witness. Appellant claims that his truck was at no time east or north of the center line of either of the two streets, and that, had respondent merely continued on his course, there would have been no collision, though he claims that respondent's automobile was much further to the south—that is, towards respondent's left—than he claims.

We think the evidence was such as to warrant the trial court in believing that respondent was well to the right side of the roadway, where he had a right to be under the law of the road; that he was moving at a low rate of speed, while appellant was moving at a high rate of speed and cutting across the corner in such a manner as to threaten a head-on collision with respondent near the curb at the northeast corner of the intersection; that the situation thus created by appellant was such as to render it apparent to respondent that he and his passengers were suddenly placed in a position of great peril; that he was induced thereby to turn to the left with a view of avoiding a collision; and that had he not done so, the injury would probably have been far more serious than resulted. As it was, no one was hurt, the only resultant injury being to the truck and automobile.

Counsel for appellant contend that respondent should not be allowed to recover because the collision actually occurred upon the south side of the roadway—that is, south of the middle of the roadway at a point where appellant had a right to be with his truck—and that

this must be so because respondent violated the law of the road in going to that side of the street. This contention would be well grounded if appellant's actions had not been the cause of respondent going to the south side of the street. The evidence being such as to warrant the trial court in believing that appellant created such a condition of apparent sudden peril to respondent and his passengers, we think appellant could not be heard to say that respondent was guilty of negligence in turning to the south side of the street.

Counsel rely particularly upon our decision in *Lloyd v. Calhoun*, 78 Wash. 438, 82 Wash. 35, 139 Pac. 231, 143 Pac. 458. That was a case where two automobiles were approaching each other on a road on a smooth, open prairie, where there was ample room to turn to the right on either side, even off the traveled portion of the road. It became largely a question as to whether or not respondent's turning of his car to the left and colliding with appellant was excusable under the circumstances—that is, whether or not his thus violating the law of the road was excusable. Judge Morris, in the dissenting opinion, following the first hearing, and which, upon rehearing, became the majority opinion, speaking for the court, held that such turning to the left by respondent was plainly not excusable, and therefore was negligence on his part and was the proximate cause of the collision. In that case respondent's car was in no such situation as we find respondent's car in this case. Adopting the view entertained by the trial court, which we think the evidence supports, we find respondent in such position that he could not turn to the right and avoid the apparent impending collision, and that his only possible chance to avoid the collision, or to render it less disastrous, was to turn to the left. In *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529, we have a decision written

July 1920]

Statement of Case.

also by Judge Morris, where the one violating the law of the road was excused for doing so and absolved from the charge of contributory negligence, because of the sudden peril in which he was placed by the driver of the oil company's truck. That, we think, is, in substance, this case. 2 R. C. L. 1196.

Some contention is made that the amount of respondent's damages was not sufficiently clearly shown. This, we think, is without merit. It is true that the evidence as to the exact amount of respondent's damages actually suffered is not very satisfactory, but it is so plain that he suffered at least \$300 damages that we do not feel called upon to further discuss this question.

The judgment is affirmed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15761. Department One. July 14, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v.
JOSEPH ROUSSEAU, *Appellant*.¹

INTOXICATING LIQUORS (42)—OFFENSES—"JOINTIST"—INFORMATION—SUFFICIENCY. An information sufficiently charges the offense of being a "jointist," defined by Laws of 1917, p. 60, § 17h, as opening up or conducting "either as principal or agent," any place for the unlawful sale of intoxicating liquor, although it does not charge that he acted as principal or agent, since he must have acted in the one capacity or the other.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered October 22, 1919, upon a trial and conviction of being a jointist. Affirmed.

¹Reported in 191 Pac. 634.

G. D. Eveland and *S. A. Bostwick*, for appellant.

Thos. A. Stiger and *Q. A. Kaune*, for respondent.

PARKER, J.—The defendant and appellant, Rousseau, was charged with, and upon trial adjudged guilty of, the offense of being a “jointist”;

“In that he, the said Joseph Rousseau, in Snohomish county, state of Washington, on or about the 1st day of May, 1919, wilfully and unlawfully did open up, conduct, and maintain at Mukilteo, in said county and state, a certain place, to wit: a certain dwelling house, together with the appurtenances thereunto appertaining and belonging, for the unlawful sale of intoxicating liquor.”

The only question to be here considered is whether or not this language quoted from the information charges appellant with the crime of being a “jointist” within the meaning of the definition of that offense as found in the Laws of 1917, p. 60, § 17h, which, so far as pertinent to our present inquiry, reads as follows:

“Any person who opens up, conducts or maintains, either as principal or agent, any place for the unlawful sale of intoxicating liquor, be and is hereby defined to be a ‘jointist.’ Any person who carries about with him intoxicating liquor for the purpose of the unlawful sale of the same be and hereby is defined to be a ‘bootlegger.’ Any person convicted of being either a ‘jointist’ or ‘bootlegger’ as herein defined shall be deemed guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.”

The substance of the whole contention here made in appellant’s behalf is that the information is fatally defective because it does not in specific terms charge him with opening a place for the unlawful sale of intoxicating liquor “as principal or agent.” It, of

July 1920]

Opinion Per PARKER, J.

course, seems plain that, in order to sustain a conviction of appellant, it must appear that he opened the place as principal, that is, as owner or proprietor of the place; or as agent of the owner or proprietor of the place; but is not this just what the language of the information necessarily means? How could one "open up, conduct, or maintain . . . any place for the unlawful sale of intoxicating liquor" except for himself as principal, or as agent for another as principal? We think the language of the information as plainly means that appellant opened the place "as principal or agent" as if these words were in the information.

Counsel for appellant rely upon our decisions in *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817; *State v. Smith*, 58 Wash. 235, 108 Pac. 618, and *State v. Hardwick*, 63 Wash. 35, 114 Pac. 873, as analogous and decisive in appellant's favor here, though they were gambling cases. In the *Gaasch* case, there was under consideration the sufficiency of an information charging that he and three others "did then and there conduct and carry on a gambling game played with cards, to wit: the game commonly known as poker, the said game being played for money, checks, credits and other things of value, in a building used for a saloon and lodging house purposes where persons resort for the purpose of playing, dealing and operating such gambling games." The statute, Laws of 1903, p. 63, under which conviction was there sought, was as follows:

"Any person who shall conduct, carry on, open or cause to be opened, either as owner, proprietor, employee, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenette, rondo, vingt-un

(or twenty-one), poker, draw poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice or any other device, or any slot machine, or other gambling device whether the same be played or operated for money, checks, credits or any other representative or thing of value, in any house, room, shop or other building whatsoever, boat, booth, garden or other place, where persons resort for the purpose of playing, dealing or operating any such game, machine or device, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for the period of not less than one nor more than three years."

The information was held to be insufficient to charge the felony so defined, because from its language it could not be said that it charged Gaasch and his co-defendants with anything more than playing at a gambling game at the alleged resort, which was a misdemeanor, and did not charge or connect them in any way whatever with the proprietorship of the resort; and since the statute was aimed only at those who were proprietors of such a resort and those who assisted in maintaining such a resort, Gaasch was not charged with the felony defined by the statute. A critical reading of the decisions in the *Smith* and *Hardwick* cases, we think, will disclose that the informations therein were held insufficient upon substantially the same grounds as in the *Gaasch* case. This appellant is in no such position under this information and statute. The language of this information, we think, could by no possible construction be said to be directed against anyone except one who was either the proprietor of the prohibited place or agent of such proprietor, in the opening, conducting or maintaining of such place, and does not charge any act done or which could be done by anyone at the prohibited place other than as proprietor or agent of such proprietor.

July 1920]

Statement of Case.

We are quite convinced that the information sufficiently charges the offense of being a "jointist." The judgment is affirmed.

HOLCOMB, C. J., MAIN, BRIDGES, and MITCHELL, JJ.,
concur.

[No. 15879. Department One. July 14, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v.
WILLIAM BURGESS, *Appellant*.¹

INTOXICATING LIQUORS (36-40)—OFFENSES—JOINTIST. Laws of 1917, p. 60, § 17h, defining a "jointist" and making it a felony to open up or conduct any place for the unlawful sale of intoxicating liquor, is not unconstitutional as making an "intent" criminal without any overt act, as it is directed against the overt acts of opening, conducting or maintaining, the intent of the accused being merely incidental.

SAME (52)—OFFENSES—PUNISHMENT—STATUTES. The offense of being a "jointist" defined by Laws of 1917, p. 60, § 17h, as a felony, is not unenforcible because it fails to specify any place of imprisonment, in view of Rem. Code, § 2265, providing that any person convicted of a felony for which no punishment is specially prescribed, shall be punishment by imprisonment in the state penitentiary.

SAME (42)—INFORMATION—"JOINTIST"—PLACE OF OFFENSE. An information charging the offense of being a "jointist," i.e. opening up or conducting a place for the unlawful sale of intoxicating liquors, under Laws of 1917, p. 60, § 17h, is sufficient without fixing the location other than charging that the offense was committed in the county.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered March 25, 1920, upon a trial and conviction of being a jointist. Affirmed.

Geo. H. Crandell and *Reuben Crandell*, for appellant.
J. B. Lindsley and *T. T. Grant*, for respondent.

¹Reported in 191 Pac. 635.

PARKER, J.—The defendant, Burgess, was charged, and upon the verdict of a jury adjudged guilty, by the superior court for Spokane county, of the offense of being a “jointist,” under the Laws of 1917, p. 60, § 17h, the language of which, so far as necessary to be here noticed, is as follows:

“Any person who opens up, conducts or maintains, either as principal or agent, any place for the unlawful sale of intoxicating liquor, be and hereby is defined to be a ‘jointist.’ Any person who carries about with him intoxicating liquor for the purpose of the unlawful sale of the same be and hereby is defined to be a ‘bootlegger.’ Any person convicted of being either a ‘jointist’ or ‘bootlegger’ as herein defined shall be deemed guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.”

The defendant has appealed to this court from the judgment so rendered against him.

It is contended in appellant’s behalf that the above quoted statute, in so far as it purports to define the offense of being a “jointist” and provides for the punishment of one adjudged guilty thereof, is unconstitutional. The following language of counsel’s brief embodies the substance of their argument in that behalf:

“In order to constitute a crime it is necessary that the act of keeping or maintaining a place must be connected with some overt act which in itself is unlawful, in order to constitute a crime. That the intent to commit a crime is, in itself, unconnected with an overt act, a violation of no law.”

Counsel invoke the general rule as stated in Wharton’s Criminal Law (11th ed.), p. 197, as follows:

“The law does not deal with a man’s inner feelings and unexecuted purposes and intentions. A mere criminal or guilty intent to do an act which is in and of itself a crime, not connected with an overt act or out-

July 1920]

Opinion Per PARKER, J.

ward manifestation, is not in and of itself a crime, and with it the law has no concern."

The argument proceeds upon the assumption that the statute seeks only to punish the entertaining of the intent, and not for the committing of any overt act on the part of the accused. This, we think, is an erroneous assumption. Manifestly the jointist statute strikes at the opening up, conducting or maintaining of places; "joints," in the common parlance, where the unlawful sale of intoxicating liquor is carried on. It seems to us that it is plainly the opening up, conducting or maintaining of such places for which the prescribed punishment is meted out. Of course, the prohibited place could not exist as such without an intent on the part of the accused to make it such a place. But that, it seems to us, does not argue that the law-making power is not primarily interested in the prevention of the opening up and maintenance of such places. We are of the opinion that the opening up, conducting or maintaining of the place for the unlawful sale of intoxicating liquor are the overt acts for which the law seeks to punish, and that the intent of the accused is merely incidental thereto; just as intent is incidental to all overt criminal acts, to be considered in determining the question of guilt. We concede that the particular intent to sell intoxicating liquor at a particular place, that is, an intent to sell it generally in the sense of making a business of so doing at such place, unaccompanied by the overt act of opening up, conducting or maintaining a place in such manner as to evidence such intent, could not be rendered punishable by legislative enactment. But we do not think such is the meaning of this statute. When one "opens up, conducts or maintains" a place for the sale of some commodity, he necessarily does so by some overt act

manifesting his intention in that regard. We think that, without some outward manifestation of such intent, and without the ability to consummate such sales by furnishing and delivering, or causing the furnishing and delivery of such commodity, it could not be said that one "*opens up, conducts, or maintains*" a place for the sale of such commodity, within the meaning of these words as used in this statute. Counsel for appellant call our attention to, and rely upon, a recent decision of the Oklahoma court in *Proctor v. State*, 15 Okl. Cr. 338, 176 Pac. 771, a decision which seems to express views out of harmony with the conclusion we here reach, though a critical reading of that decision may suggest to some minds that the question as there presented may be differentiated from the one here presented. We are, however, so thoroughly convinced of the soundness of our conclusion in this case that we would feel constrained to adhere to it rather than follow the Oklahoma decision, even though it be not distinguishable from our present case.

Contention is made in appellant's behalf that the judgment is erroneous and that no judgment can be rendered against appellant under this statute, because it fails to specify any place of imprisonment as punishment for the commission of the prohibited act. This contention is answered by the provisions of § 2265, Rem. Code, reading as follows:

"Every person convicted of a felony for which no punishment is specially prescribed by any statutory provision in force at the time of conviction and sentence, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both."

It seems plain, therefore, since the jointist statute defines the offense as a felony, that the punishment

July 1920]

Opinion Per PARKER, J.

therefor should be in the penitentiary, as was adjudged in this case, even though that statute be silent on the question of the place of imprisonment.

It is further contended in appellant's behalf that the information does not sufficiently plead facts constituting the offense as defined in the statute, because it fails to allege the commission thereof at any particular location in Spokane county, the charge being only that the offense was committed in Spokane county. The argument is that, since this offense, when committed, necessarily has a fixed location with some relation to real property, it is necessary in the information to specify such location. This contention may find some support in the older authorities, and possibly even at this day in some jurisdictions, but we think it is answered in this state by the decision of this court in *State v. Meyers*, 9 Wash. 8, 36 Pac. 1051, wherein it was held that a charge of arson was sufficiently specific as to location when it stated that the crime was committed in Spokane county. It seems plain that the offense here involved could have no more close relationship to some specific location and property than could the crime of arson. Whatever appellant's rights may have been as to his being advised upon the trial as to the exact location of the offense charged, it seems well settled in this state that the information is not rendered defective because of its failure to state the particular location of the commission of the offense within the county of the court's jurisdiction.

It is finally contended that the information is insufficient in that it fails to charge the defendant with conducting and maintaining the place as principal or agent. This exact contention was disposed of adversely to the claims here made in appellant's behalf in our decision in *State v. Rousseau*, ante p. 533, 191 Pac. 634.

We conclude that the judgment must be affirmed. It is so ordered.

HOLCOMB, C. J., MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

[No. 15930. Department Two. July 14, 1920.]

THE STATE OF WASHINGTON, *Plaintiff*, v. THE SUPERIOR COURT FOR ADAMS COUNTY *et al.*, *Respondents*.¹

EMINENT DOMAIN (101, 104)—STATE ROADS—PROCEEDINGS—STATUTES—CONSTRUCTION. Under Rem. Code, § 5872, authorizing the state to condemn lands for state highways in the manner prescribed for condemnations for county roads, and § 5635, providing for county road condemnations, in case the commissioners after hearings and notices are unable to agree with owners, "in the manner provided by law for taking private property for public use" by proceedings under Id. §§ 921-936, the state may proceed under the last named sections without the hearings, notices or agreements referred to in the establishment of county roads, it not being the intention to impose upon the state the preliminary details imposed upon counties.

SAME (39) — NECESSITY FOR APPROPRIATIONS — EVIDENCE — SUFFICIENCY. A reasonable necessity for the condemnation of lands for a main state highway is shown, notwithstanding evidence that the lands are valuable for wheat growing in large tracts, that the straight road sought would cut up the tracts and greatly reduce the value of the lands, and that present roads following the section lines are available, where it appears that the section line roads would require dangerous curves and increase the length of the road one mile, the original paving of which would cost \$25,000.

Certiorari to review a judgment of the superior court for Adams county, Truax, J., entered May 14, 1920, in favor of the defendants, dismissing consolidated actions to condemn rights of way for a state road, tried to the court. Reversed.

¹Reported in 191 Pac. 413.

July 1920]

Opinion Per BRIDGES, J.

The Attorney General and John A. Homer, Assistant, for plaintiff.

Chas. P. Lund, for respondents.

BRIDGES, J.—This is a suit to acquire by condemnation right of way for a state road.

The legislature of 1915 created the Central Washington Highway in the following words:

“A primary state highway is established as follows: A highway connecting with the Inland Empire Highway at Pasco, Washington; thence by the most feasible route through Connell, Ritzville, Sprague and Cheney to Spokane, Washington, to be known as the Central Washington Highway.” Section 5878-2 (d), Rem. Code; Laws of 1915, p. 486, § 5.

The state authorities are now procuring right of way for this highway. It has already acquired most of the right of way between the town of Connell and the town of Lind, a distance of several miles. Being unable to acquire by purchase the right of way through a part of three contiguous sections, it instituted five condemnation suits; one to secure the right of way through a part of the northeast quarter of section 4, township 14, range 33 E. W. M.; another for the right of way through a part of the southeast quarter of section 33; a third for right of way through a part of the southwest quarter of section 34; a fourth to acquire the right of way through a part of the northwest quarter of section 34; and the fifth for right of way through a part of the northeast quarter of section 34, all in township 15, range 33 E. W. M. By stipulation, all these cases were consolidated for the purpose of the hearing on the question of necessity. At the termination of the hearing, the trial court entered an order in each case to the effect that the testimony failed to show a necessity to acquire the right of way through

the lands described, and ordered the suits dismissed with costs. Later, it was stipulated between the parties that the various cases might be consolidated in one application to this court for a writ of certiorari. Upon such application, the writ was issued and the complete record is now before us.

There are two chief questions presented for our determination: First, has the state proceeded to acquire the right of way in the manner provided by the statutes of the state of Washington; and second, does the testimony establish a necessity for the taking of the particular lands involved.

Section 5872, Rem. Code, provides as follows:

“The state highway commissioner is hereby authorized to acquire right of way on behalf of the state for state roads by gift, purchase or condemnation in the manner prescribed by law for the acquirement or condemnation of lands for county roads. The cost of such right of way shall be paid for from the fund apportioned to the state road for which such right of way is acquired. . . .”

Section 5623 *et seq.*, Rem. Code, provide a complete program for the laying out and establishment of county roads and acquiring rights of way therefor. These sections provide that county roads may be established either by resolution of the board of county commissioners or upon petition by householders. They provide for various hearings before the board of county commissioners, of which hearings the persons interested must be given notice. Section 5634 provides that the commissioners shall determine the amount of damages to which each landowner is entitled, and by § 5636, such amount must be tendered to the landowner. Section 5635 provides that, if such award of damages is not accepted, the board shall direct that the right of way be procured by condem-

July 1920]

Opinion Per BRIDGES, J.

nation, "in the manner provided by law for the taking of private property for public use, and to that end are hereby authorized to institute and maintain in the name of the county the proceedings provided in sections 921 to 936 of this act. . . ." The sections last referred to provide the manner and way whereby corporations may acquire right of way by condemnation.

We find, therefore, that the condemnation procedure for a state road right of way must be the procedure provided for acquiring by condemnation county road rights of way, and that county road rights of way must be condemned in the manner provided for condemnation of rights of way by corporations. The state, in the cases under discussion, has proceeded in the manner provided for acquiring rights of way by corporations. The defendant, however, contends that, since the statute (§ 5872, Rem. Code) authorizes the state to condemn "in the manner prescribed by law for the acquirement or condemnation of lands for county roads," it is necessary that the state follow and comply with the complete preliminary provisions with reference to acquiring rights of way for county roads. In other words, it is contended that it is necessary that the state highway board hold meetings and give notices, determine the amount of damages, and make tender thereof, and otherwise comply with the county road act, before it could authorize the commencement of a condemnation suit. We do not so construe the statute under discussion. It does not mean that the state highway commissioner or the state highway board shall carry out all the details preliminary to a condemnation provided for acquiring rights of way for county roads. It simply means that the actual condemnation proceedings shall be those pro-

vided for acquiring county roads. Reading the various statutes together, we find that condemnation for state roads shall be the same procedure provided for condemning for county roads, and that condemnation for the latter shall follow the procedure provided for acquiring rights of way by corporations. The state road statute means the same as if it had provided that state road rights of way must be acquired in the manner provided by law for acquiring rights of way by corporations. To give the state highway statute the construction contended for by defendant would be to impose upon the state duties which it could not perform and which would have the effect of making it impossible for the state to acquire by condemnation rights of way for state roads. If the legislature had intended that the state should carry out the various preliminary details imposed upon counties, it would certainly have expressly so said. We have no doubt, therefore, that the state is proceeding in the manner provided by law.

The next question is whether the testimony is sufficient to authorize the state to acquire the particular right of way sought.

Section 925, Rem. Code, provides that, if at a proper hearing on the question of necessity the court be satisfied "that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise," then it may make the preliminary order of necessity. The duty resting on the courts under this statute is stated in *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855, where we said:

"We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views,

July 1920]

Opinion Per BRIDGES, J.

is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection. Plainly, the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary, it conclusively established the necessity. It is sufficient to make a strong *prima facie* case, but when convincing evidence is adduced by the owner that the land sought is not reasonably necessary and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained would amount to oppression and be an abuse of the power."

The testimony tends to show that the lands through which the proposed right of way runs form a part of a valuable wheat raising section of the state; that such lands and those in the immediate vicinity are practically level; that they are worth about \$75 per acre; that they are farmed and cultivated by means of large tractors, and that tractors can be used successfully only on large tracts of land; that, if these lands are cut up by the proposed right of way, they will be reduced in value from twenty-five to fifty per cent; that there are county roads already established and open for travel, around nearly all of the sections of land involved, as well as those sections in the immediate vicinity, which county roads follow the section lines, and that the state road could follow some one or more of these section line roads and thereby do a great deal less damage and injury to the lands sought to be condemned.

On the contrary, the state's testimony tends to show that the road which it is seeking to build will be a main highway and that it is necessary to make it as short and straight as possible; that, if the section line roads should be followed, the road would be lengthened in this immediate locality about one mile over the proposed road; that it would have sharp turns and bends which would be dangerous to travelers; that the expense of constructing and maintaining the additional mile of road would be great, and that it has already acquired its right of way on each side of the tracts of land here in suit.

At the trial it was orally agreed that, if the state would follow the section line roads, the landowners would procure for the state, without cost to it, reasonable quantities of land at the various section corner turns, so that, at such corners, the road curves could be flattened out in such a manner as to make reasonably safe turns. If the testimony of the owners is to be accepted, it must be admitted that the lands through which it is sought to acquire the right of way will be materially damaged. On the other hand, the court must take knowledge that this road when completed will be extensively traveled by fast moving automobiles and motor trucks, and that the roads of by-gone days are wholly inadequate for present day purposes. While section line roads may be sufficient for the accommodation of an immediate vicinity, they are wholly inadequate for a main line road. The advent of the automobile and the auto-truck, and the consequent extensive and ever-growing use to which roads are put, makes it necessary that main thoroughfares be built upon the best route obtainable. If the landowners in this locality may compel a main state road to be lengthened and to contain many, and perhaps more or less dangerous curves, in order to avoid cut-

July 1920]

Opinion Per BRIDGES, J.

ting up and damaging their lands, so may landholders elsewhere, for equally good reasons, compel state roads to be lengthened, and the cost of construction and maintenance thereof greatly increased. Such a doctrine, carried to its legitimate end, would make main and heavily traveled state roads little better than the common community roads. The desire of the landowners here to maintain their lands as they are, so that they can better use them for farming purposes, is a laudable one, but that desire must give way to the greater and more important necessities of the general public, particularly where, as here, under the law, the state must compensate them for such damage as they will suffer.

Nor can we very seriously consider the offer of the landowners to provide land to flatten the curves, should the road follow the section lines. In the first place, there is no agreement as to how much land would be necessary for these purposes, or as to what degree the curves should have. There is no certainty that the parties can agree on these things, nor, for that matter, that the landowners can acquire the land for these purposes. But if it be conceded that these things could be agreed upon and done, yet but little good will have been accomplished, because the road would still be about a mile longer and would contain many additional objectionable curves. The testimony shows that it would cost about \$25,000 to put the original pavement on this extra mile, to say nothing of the additional cost of maintenance. Every additional mile on a main road adds greatly to the cost of construction and maintenance; adds expense to every auto, every motor truck, every vehicle which travels it. Every curve makes additional dangers to the traveler. The reasons which induce railroad companies to spend large sums in flattening or altogether cutting out

curves, and in so building or rebuilding the road as to get the shortest possible distance between given points, are, in a very great measure, applicable to the building of main highways.

We are satisfied that the testimony shows a reasonable necessity for acquiring this right of way, and that the learned trial court was in error in holding to the contrary. The judgment is reversed, and the cause remanded with directions to the lower court to enter an order of necessity and permit the state to proceed to the assessment of damages as provided by law.

HOLCOMB, C. J., MOUNT, TOLMAN, and FULLERTON, JJ., concur.

[No. 15824. Department One. July 14, 1920.]

OSNER & MEHLHORN, INCORPORATED, *Respondent*, v.
ADOLF LOEWE *et al.*, *Appellants*.¹

BILLS AND NOTES (97)—DEFENSES—BREACH OF CONTEMPORANEOUS PROMISE. It is no defense to an action on a mortgage note that plaintiff breached its contemporaneous oral agreement to employ defendant as its attorney, where the exact amount of the note was delivered to defendant at the time of the execution of the note.

CONTRACTS (4)—ESSENTIALS—MUTUALITY. A promise to employ defendant as plaintiff's attorney, without any obligation on the attorney's part to do the work, is unenforceable.

PLEADING (101)—AMENDMENT AT TRIAL—DISCRETION. It is not an abuse of discretion to refuse to permit a trial amendment after the evidence was in, where the issues had been made up for eight months and several continuances had been granted at appellants' request.

MORTGAGES (213)—FORECLOSURE SALE—CONFIRMATION. Confirmation of a sheriff's mortgage foreclosure sale should not be denied because of the sheriff's failure to sign the affidavit of publication of notice, where it was corrected by permission at the hearing.

¹Reported in 191 Pac. 746.

July 1920]

Opinion Per MITCHELL, J.

SAME (213). Inadequacy of price is not ground for refusing to confirm a mortgage foreclosure sale, where a homestead declaration had been filed, it was sold to the highest bidder for less than the judgment, and the mortgagors had a year within which to redeem.

SAME (213). A mortgage foreclosure sale of four lots *en masse*, is not ground for refusing to confirm the sale, where the lots were considered as a single tract suitable for a homestead, and the sheriff's return states a sale in one parcel was deemed most advantageous.

APPEAL (232, 236)—SUPERSEDEAS OR STAY—RIGHT TO—DEFICIENCY JUDGMENT. Upon appeal from a deficiency judgment in foreclosure in a certain amount, appellant is not entitled to a stay of execution pending the appeal, in the absence of a stay bond under Rem. Code, § 1722, requiring a bond in double the amount of the judgment appealed from.

Appeal from a judgment of the superior court for King county, Smith, J., entered November 29, 1919, in favor of the plaintiff, in an action on a promissory note and to foreclose a mortgage. Affirmed.

Edgar C. Snyder, for appellants.

Edward Von Tobel, for respondent.

MITCHELL, J.—This action was commenced in August, 1918, to recover judgment on a promissory note in the sum of \$1,200, and to foreclose a mortgage given to secure the same on July 7, 1910, payable three years after the date thereof. The only payments that had been made were for interest to July 7, 1916.

The answer, after a general denial of the allegations of the complaint, contained a first affirmative defense alleging the existence of an agreement whereby the attorney for plaintiff was to receive for his services in the present case an amount less than that specified in the note and mortgage sued on and less than that to be fixed by the court in the decree. The answer also set up an alleged second affirmative defense to the effect that the note and mortgage were given for

money used in the improvement of the real estate mortgaged, and that the defendants were induced to make the improvements thereon through the false representations of the plaintiff that it would sever its connections with its then attorney and employ exclusively the defendant Adolf Loewe as its attorney; that, at the date of the note and mortgage, and ever since, plaintiff had, and still has, an amount of litigation yielding in any one year attorneys' fees far in excess of the amount of the note, and that plaintiff gave only a part of its litigation to defendant and decreased the same year by year, though repeatedly asked by defendant to keep its promise; that defendants have made diligent efforts to meet their note, but defaulted because of the foregoing conduct of the plaintiff in its breach of agreement to employ defendant, which breach was committed with intent to defraud defendants and take from them their home after the same had increased in value many times; and that, because of the practices of fraud of plaintiff as alleged, the consideration for said note and mortgage has wholly failed. A demurrer was sustained to the second affirmative defense. The allegations of the first affirmative defense were denied by a reply.

At the trial, after the plaintiff had put in all its evidence, the defendants made an oral application for leave to amend their answer by setting up certain matter which consisted, first, of substantially the same matter as that contained in the second affirmative defense, to which a demurrer had been sustained; and second, matter in the nature of set-offs consisting of two parts, viz.: (1) That, from August 10, 1910, to July 7, 1915, defendant Adolf Loewe had conducted some thirteen mortgage foreclosure cases for plaintiff wherein the trial court had allowed in the decrees

July 1920]

Opinion Per MITCHELL, J.

attorney fees aggregating \$863.81 in excess of what had actually been paid by the plaintiff to the defendant for his services therein, which excess it was alleged was unlawfully withheld by the plaintiff; and (2) that in certain other litigation, from 1910 to the date of the commencement of this suit, there was a large amount of certain other specified litigation, wherein plaintiff was either suing or sued, conducted for the plaintiff by some other attorney, wherein by the agreement defendant Adolf Loewe should have been employed, justifying reasonable attorneys' fees largely in excess of the amount due on the note and mortgage involved in this suit. An objection to the trial amendment was sustained. Upon the conclusion of the evidence, there was judgment for the plaintiff as demanded in the complaint. Subsequently, upon an order of sale, the sheriff sold the property for an amount \$150 less than required to satisfy the judgment, costs and increased costs. Objections to the confirmation of the sale were overruled and an order entered confirming it. Thereafter defendants applied to the court for an order staying the execution of the deficiency judgment of \$150 during the pendency of the appeal. The application was denied. The defendants have appealed from the judgment, the order confirming the sheriff's sale of real estate, and the order denying defendants' application to stay the execution.

First, it is claimed error was committed in sustaining the demurrer to the second affirmative defense. This portion of the answer says: "The note and mortgage were given for money used in the improvement of the real estate mortgaged," which must be taken as an admission that the note and mortgage were given and that \$1,200 were received by the appellants, as alleged in the complaint. We are aware

of no rule permitting the defense, in a suit upon a promissory note, of a breach of simply an oral promise of future employment, contemporaneously made to the defendant by the payee in the note, who, at the time of taking it, delivers to the maker the exact amount of money expressed in the note. As to the claim of being overreached, it is to be noticed the answer does not allege that the oral agreement provided the note should or might be paid by services to be rendered, but only that appellant would be employed in the future. Nor is it alleged that, at the date of the note, the appellants had no other means by which to pay, or that respondent understood they had no other way of paying. It is not claimed appellant Adolf Loewe was to give his time exclusively to the law work of the respondent, or that he obligated himself to do any law work for the respondent in the future. It was but a one-sided promise, revocable, or that might be ignored, at the pleasure of the promisor.

Next, it is claimed the court erred in excluding evidence in support of the first affirmative defense. There was no evidence offered on the subject. Appellant Adolf Loewe testified that, sometime in 1909 or 1910, two officers of the respondent corporation told him they never paid their attorney the amount fixed by the court as attorney fee, but nothing was offered to show the respondent's attorney in the present case was acting under that or any similar agreement.

Assignments number 3 and 4 relate to the refusal of the court to permit the trial amendment as hereinbefore described. As already noticed, the application was made after the respondent had put in its proof. A portion of the proposed amendment had been already disposed of adversely on a demurrer thereto. As to the remainder, if it be assumed that, generally

July 1920]

Opinion Per MITCHELL, J.

speaking, it would be proper matter to be included in the answer, the application at that time was nevertheless addressed to the sound discretion of the court. It appears from the record the issues had been completed some eight months before the trial, and that several continuances had already been granted at the request of the appellants. We are satisfied there was no abuse of discretion by the trial court in denying leave to amend.

The fifth assignment is that the court erred in granting judgment and decree of foreclosure. The proof in support of the complaint was ample and uncontradicted.

In the sixth assignment it is claimed the court should not have confirmed the sheriff's sale of property, for three reasons: (1) Because the affidavit of publication of notice of the sheriff's sale was not properly signed as the same appeared in the sheriff's return of sale. Upon permission of the court, properly granted, the irregularity was corrected and the affidavit correctly signed at that hearing. (2) It is claimed the sale should have been set aside because of inadequacy of the price at which the property was sold. There were affidavits that the property was worth largely in excess of the amount for which it was sold, and it also appears that, only a few months before the sale, appellants filed a declaration of homestead upon the whole of the property, alleging that its worth was \$4,000, but this seems to us to be immaterial. It was sold to the highest bidder, and the appellants cannot be injured by the sale of the property for less than the amount of the judgment. They have a year in which to redeem from the sale, and the less the bid, the smaller amount required to redeem. (3) It is claimed that the sale was irregularly made because the

four lots were sold *en masse*, rather than in separate parcels. There is nothing to show that any one else was interested in the property. Together, the several lots had been considered as a single tract and suitable for a homestead, by the declaration of appellants filed for that purpose; and the sheriff's return states the premises were sold in one parcel, "deeming that the most advantageous," which was according to the provision of § 583, Rem. Code.

Finally, it is claimed the court erred in denying an application of the appellants for an order staying the execution of the deficiency judgment during the pendency of their appeal to this court. In this there was no error. The deficiency judgment was definite and certain. The statute, Rem. Code, § 1722, provides that, in order to effect a stay of proceedings, a bond, where the appeal is from a final judgment for the recovery of money, shall be given in a penalty double the amount of the judgment appealed from. It was a case in which there was no occasion for an application to the court. The matter was definitely fixed by the provisions of the statute.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MACKINTOSH, JJ.,
concur.

July 1920]

Opinion Per MACKINTOSH, J.

[No. 15801. Department One. July 14, 1920.]

WONDERFUL GROUP MINING COMPANY, *Respondent*, v.
L. L. RAND, *Appellant*.¹

CORPORATIONS (308)—OFFICERS—COMPENSATION—VOTE BY INTERESTED TRUSTEE. A board of trustees of a corporation consisting of five members cannot, by the passing of three resolutions, vote compensation for past services to four of the members, although one resolution was for a salary as secretary, one for a salary as treasurer, and the other for legal services to two other trustees; since all but one member were pecuniarily interested in the general plan, and to be valid it would be necessary that three disinterested members vote for the passage of each resolution.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered September 29, 1919, upon findings in favor of the plaintiff, in an action by a board of trustees to recover salaries paid to officers of a corporation, tried to the court. Affirmed.

D. W. Henley, for appellant.

Don F. Kizer, for respondent.

MACKINTOSH, J.—In 1896, the respondent was organized under the laws of this state for the purpose of developing mining claims located in British Columbia. In article 4, section 3, of the by-laws of respondent it is provided: "The treasurer shall be entitled to such compensation as the board of trustees shall fix and allow." By article 5, section 2, it is provided that the "secretary shall receive such compensation as the board of trustees may fix and allow." The trustees, in July, 1896, fixed the salary of the secretary at \$75 per month, which was paid until November, 1896, and on October 7, 1896, the salary of the treasurer was fixed at \$50 per month, and the salary of the secretary increased to \$125. Both of these officers drew these

¹Reported in 191 Pac. 631.

salaries from November 1, 1896, until the board of trustees passed a resolution September 14, 1897, abolishing all salaries. These were the only resolutions with reference to salaries until the resolution of June 3, 1918. On that day a resolution was passed, by a vote of four of the five members constituting the board of trustees, providing for the payment to the secretary of a salary of \$300 per year for the entire term during which he had acted as secretary, and paying the appellant, as treasurer, a like amount for a like time, and, at the same meeting, another resolution was passed paying to two other members of the board of trustees \$500 each for legal services. Of the members of the board of trustees, the one who voted against these three resolutions was a beneficiary of the last resolution.

From 1897 to 1913, the company was inactive, the ore chute of the mines having been lost. During this time neither the license fees due the state of Washington or to the province of British Columbia were paid, and from 1902 until 1917, no meeting was held of the stockholders. Members of the board of trustees resigned and their successors were elected by the remaining members, and in September, 1907, the board of trustees elected a secretary, who is the beneficiary of the resolution of June 3, and in 1915, elected the appellant Rand as treasurer. When elected secretary and treasurer, both officers were members of the board of trustees. From 1908 to 1913, there were no entries made in the books, and there was no transfer of stock from 1908 to 1915. Only one meeting of the board of trustees was held from 1908 to 1913. In 1913, the trustees entered into a lease of the mining property, under which royalties were paid, which in the event of purchase were to apply on the sale price. Prior to June 3, 1918, these royalties amounted to \$9,000. Shortly

July 1920]

Opinion Per MACKINTOSH, J.

prior to June 3, 1918, a verbal agreement had been made for an extension of this lease for a period of three years, and at the meeting of June 3, 1918, after having passed the resolution already mentioned, a resolution was passed granting such extension. Immediately after the close of this meeting, the trustees repaired to a bank in Spokane, where the meeting was held, and turned in their stock and drew down the purchase price, as provided in the extension agreement. The secretary was paid \$3,300, and appellant was paid \$1,050, in conformity with the resolution passed on that date.

A new board of trustees having been elected, it repudiated the salary resolutions and instituted this action to recover the amounts paid thereunder.

During the time the company was in existence, the stock had been distributed in various hands and the stockholders generally had taken very little, if any, interest in the affairs of the company, and the arrangements which finally resulted in the sale of the property were arrangements which were made through the active instrumentality of the members of the board of trustees. It is claimed by appellant that the testimony shows that he and the secretary, at the time they accepted election as secretary and treasurer, had an agreement with the board of trustees that they were to be compensated for their services, and had it not been for such agreement, they testified, they would not have accepted the offices.

Where the board of trustees of a corporation is by its by-laws empowered to fix and allow compensation to its officers, and where they enter into a contract, express or implied, to allow compensation for services of such officers (other than trustees), the corporation is bound thereby, and such officer can recover reasonable compensation for such services or such salary as

the board of trustees may fix as such reasonable compensation. *Clark & Marshall, Corporations*, vol. III, pages 2064-5; *St. Louis F. S. etc., v. Tiernan*, 37 Kan. 606, 15 Pac. 544; *Bassett v. Fairchild*, 132 Cal. 637, 61 Pac. 791, 64 Pac. 1082, 52 L. R. A. 611.

It has been held that a trustee may receive compensation from the corporation for services which he performs other than those performed by him as trustee. *Burns v. Commencement Bay Land Co.*, 4 Wash. 558, 30 Pac. 668, 709; *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596; *Argo Mfg. Co. v. Porter*, 52 Wash. 100, 100 Pac. 188.

The respondent contends, however, that the trustees of a corporation have no right to vote themselves compensation for past services, either as trustees or as officers. It is true that trustees cannot recover compensation for their services as trustees. 7 R. C. L. 445; *Crumlish's Adm'r v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Wood v. Lost Lake & C. Mfg. Co.*, 23 Ore. 20, 23 Pac. 848.

It is unnecessary for us, in view of the determination we are to make of this case, to pass upon the question of whether the board of trustees might, under such power as is contained in the by-laws here, vote back salaries to officers who may also be trustees.

The record in this case shows clearly that the rule of law which provides that a trustee may not vote upon his own compensation was violated by the resolution of June 3, and that the act of the trustees in passing a series of resolutions awarding money to four out of the five members of the board was void. It appears that the members of the board of trustees felt, and honestly, that, as they by their efforts had secured a favorable sale of the property of the corporation, resulting in a benefit to the stockholders, that therefore

July 1920]

Opinion Per MACKINTOSH, J.

they should receive some compensation greater than that which would accrue to them merely through their ownership of stock. The method, however, by which they sought to obtain this extra compensation was not by a resort to the stockholders and from the stockholders to obtain authority to so compensate themselves. When they became members of the board of trustees they were charged with the duty of using their best efforts for the promotion of the interests of the stockholders, and nothing was done but what should have been done by them in the performance of such duty. By the resolution, the trustees were attempting to pay themselves for these general services under the guise of compensation for special services. The record in the case clearly indicates that these resolutions were merely a subterfuge. It appears that, at various times, discussions had taken place among the trustees, the net result of which was that a majority of them were inclined to compensate themselves after the property was finally disposed of, and that, when it had become apparent that a sale was to take place, and it having in general been agreed to on or before June 3, and that, in addition to the sale amount, the company was in possession of \$9,000, due on royalties on the original sale agreement, which it had decided to retain before agreeing to an extension and modification of the original sale agreement, and that compensation could be secured from that amount, and instead of submitting the matter to the stockholders, the device of June 3 was adopted.

Granting that the board of trustees might compensate officers but not trustees for past services, it is the rule that, where concerted action of this kind is taken, the passing of a resolution awarding such pay must be had without the vote of any one pecuniarily interested in the resolution. The board of trustees consist-

ing of five members, it was necessary for three disinterested members to vote for the passage of each resolution. The record shows that, of the four voting for each resolution, three were pecuniarily interested in the general scheme, although the scheme was divided into three resolutions. Taking, for instance, the resolution awarding salary to the secretary, we find it was voted for by the president, who was to receive compensation under a companion resolution; the treasurer, who was to receive compensation under a companion resolution; the secretary, who was to receive compensation under the resolution itself, and one of the members who had no pecuniary interest in the general plan.

In the case of *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131, 23 Atl. 708, three separate resolutions were introduced, fixing the salaries of the president, vice president, and assistant treasurer; the board of trustees consisting of the three officers and two others. The Connecticut court disposed of the contention that the trustees could evade the rule by making separate resolutions for each officer, saying:

“But whether this action of the directors be regarded as one vote or as three separate votes can make no real difference. If there were three votes, they were all passed at the same meeting. They were related to each other, and all had reference to one common object, the continuing the same persons in the management of the business of the corporation who were then managing it. So that the three separate votes, or the three parts of one vote, must all be taken together in order to ascertain what influences operated to procure the passage of any one of them, and to determine their effect when passed.

“It is not necessary to suppose that there was any formal agreement beforehand between the three directors interested that these three votes should all be passed. It is altogether likely there was no such agreement. But the votes were all before the directors’

July 1920] Concurring Opinion Per HOLCOMB, C. J.

meeting at the same time. These three directors were all present. They were each interested in the common object to be attained by their passage. No one of these votes could be passed without the affirmative voice of one of these directors."

In the case at bar, the affirmative vote of at least two of the interested parties was needed to pass any one of the resolutions, and such trustees had no more right to vote on any of the resolutions than if only one resolution had been introduced embracing the contents of the entire three. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Boothe v. Summit Coal Mining Co.*, 55 Wash. 167, 104 Pac. 207; *Smith v. Los Angeles etc. Ass'n*, 78 Cal. 289, 20 Pac. 677; *Steele v. Gold Fissure Gold Mining Co.*, 42 Colo. 529, 95 Pac. 349.

For the reasons stated, the judgment will be affirmed.

MAIN, PARKER, and MITCHELL, JJ., concur.

HOLCOMB, C. J. (concurring)—I concur in the result, for reasons not stated in the majority opinion. The principal, and only reason necessary to here state, is that, as shown by the testimony of appellant himself, and of Schermerhorn, the secretary, what was contemplated, at the time of their election as treasurer and secretary, respectively, was compensation for performing corporate, executive duties, and not for additional duties as treasurer and secretary. Had there been any such agreement to grant them salaries as treasurer and secretary, even though not of record, and had it been performed, or made a charge upon the company prior to the consummation of the sale by the company's stockholders of the majority stock, in my opinion, they should have recovered such compensation. But, as a matter of *fact*, such was not the case.

[No. 15756. Department One. July 15, 1920.]

ARCH D. BROWN, *Plaintiff*, v. HUNT & MOTTET COMPANY
et al., *Appellants*, NORTHWEST PEACE JUBILEE,
Defendant.¹

RECEIVERS (40-1)—APPOINTMENT—EFFECT UPON LIENS. The appointment of a receiver does not affect the rights of parties to liens or prevent the filing of claims therefor.

MECHANICS' LIENS (40)—NECESSITY OF FILING CLAIMS—EXCUSES—APPOINTMENT OF RECEIVER. In view of Rem. Code, § 1134, providing that no mechanic's lien shall "exist" unless notice is filed in the auditor's office, the failure to file a lien upon structures of a temporary nature, constructed upon city streets, is not excused by the fact that, before the time for filing had expired, a receiver was appointed and sold the structures under order of court; and no preference right can be claimed upon the fund derived from the receiver's sale without first perfecting the lien in the manner required by the statutes.

Appeal from an order of the superior court for Pierce county, Clifford, J., entered October 20, 1919, denying a preference right to payment of claims of materialmen from funds derived from a receiver's sale, after a hearing before the court. Affirmed.

W. W. Keyes and Burkey, O'Brien & Burkey, for appellants.

Stiles & Latcham, for respondent.

MITCHELL, J.—This is an appeal from an order denying to Hunt & Mottet Company, a corporation, and to the City Lumber Agency, a copartnership, preference in payment claimed by them out of funds derived by the receiver of the Northwest Peace Jubilee, an insolvent corporation, from the sale of buildings and structures erected by that corporation upon cer-

¹Reported in 191 Pac. 360.

July 1920]

Opinion Per MITCHELL, J.

tain streets and alleys in the city of Tacoma for the purpose of conducting a public celebration during the week of July 4, 1919.

The facts are not in dispute and are substantially as follows: The Northwest Peace Jubilee was organized under the laws of this state in April, 1919, as a corporation, not for carrying on trade or business for profit, but as expressed in its articles of incorporation, for the purpose of

“putting on and staging of the Northwest Peace Jubilee and Fourth of July celebration in the city of Tacoma, Washington, and such other attractions and celebrations as in the opinion of the majority of all concerned shall best promote the interests of the city and community, and especially for the purpose of raising funds for the Tacoma Sailors and Soldiers auditorium to be built by the citizens of the city of Tacoma in memory of the soldiers and sailors of the northwest, living or dead, who served our country in defending us, our homes and the world civilization in the late world war.”

Upon its organization, it procured from the city council of Tacoma permission to exclusively occupy portions of certain designated streets and alleys in the city with wooden structures during eight days, commencing June 30 and ending July 7, 1919, to enable it to carry on the celebration, which included various shows, exhibitions and amusements. In giving its permission, the city council required that, immediately after July 7, all fences and other structures should be removed, of which permission and condition the appellants had no actual notice.

Pursuant to the plans of the corporation and permission given by the city, certain buildings, booths and fences were erected by the corporation upon the streets and alleys designated. Upon request of the corporation, the City Lumber Company and the Hunt & Mottet

Company, during the month of June, furnished material that was used in the buildings and fences, for which they have not been fully paid. The only sources which the corporation had for the payment of its obligations was its receipts for admission to the show grounds and other fees and charges collected from exhibitors, and those being insufficient, it became insolvent and, at the suit of a creditor, a temporary receiver was appointed on July 9, 1919, and it appears a permanent receiver was appointed on July 16, 1919.

In the month of July the receiver, under direction of the court, sold the structures and fencing for \$1,682.75 (greater than appellants' two claims) to sundry persons, who tore down and removed them from the streets and alleys. The receiver has on hand belonging to the insolvent estate more than enough money to pay appellants' claims in full. Neither of the appellants filed in the office of the auditor of Pierce county any claim of lien upon the structures and buildings, but each did file its claim with the receiver within ninety days after the cessation of the delivery of the material furnished by it, claiming a preference right out of the funds realized from the sale of the buildings and structures.

The lands upon which the structures were erected were parts of the streets of Tacoma, upon which no lien could be asserted, but it was otherwise with the structures, under § 1146, Rem. Code, which provides:

“When, for any reason the title or interest in the land, upon which the property subject to the lien is situated cannot be subjected to the lien, the court may order the sale and removal from the land of the property subject to the lien to satisfy the lien.”

It is the contention of appellants that the court, through its receiver, having sold the buildings to per-

July 1920]

Opinion Per MITCHELL, J.

sons who tore them down in order to remove the material, within the ninety days in which appellants were entitled to file their claims with the county auditor, entitled them thereafter, if within the statutory period of ninety days, to file their claims with the receiver against the fund derived from the sale of the buildings, with the like effect of priority of payment out of that fund as if their claims had been filed with the county auditor prior to the appointment of a receiver.

Upon the subject of liens of mechanics and materialmen, § 1134, Rem. Code, provides:

"No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof to be affected thereby, is situated."

The right of the lien being statutory, it is apparent, by the very terms of the law, that it shall not exist unless, within ninety days after the cessation of the furnishing of the material, a claim shall be filed for record with the county auditor, and hence in the present case no lien ever did exist. But, as already stated, it is claimed that appellants' right of ninety days' time in which to file their claims with the county auditor having been intercepted by the court and its receiver's sale, "there was nothing for claimants to file against, other than the fund in the hands of the court realized from the sale of the structures," and that their priority of payment should be protected by the course they have taken. Appellants cite *Central Trust Co. v. Texas etc. R. Co.*, 23 Fed. 673, where, in a short opinion delivered orally, it was said:

“Where parties are entitled to a lien, and can secure it by certain proceedings under the statutes of the state, they are not required to go to the expense of such proceedings, but this court will treat it as though all needful steps had been taken to establish the lien.”

The lien law of Missouri under consideration in that case did not contain any prohibitory language such as is found in our statute, and in addition, while the opinion is not clear upon the subject, it appears that the court in a receivership case was but approving the master's action in allowing a preference at a date when if disallowed the claimant yet had time to file his notice of claim within the time provided by statute upon property still in existence upon which the material had been furnished.

Next, the case of *Commonwealth Roofing Co. v. North American Trust Co.*, 135 Fed. 984, is relied on by appellants. It was a case under the New Hampshire statute. The statute provided that the furnishing of material *ipso facto* gave the lien, wherefrom the lienor did nothing to enforce his rights until and except by attachment proceedings within a specified time. Prior to the expiration of the time within which attachment proceedings might have been had, a receiver was appointed, who took charge of the property, and the court held the proper remedy of the lienor to protect his priority was in the receivership proceedings, under the rule that the appointment of a receiver does not divest the property of prior existing liens, but affects them only in the manner and time of their enforcement. It was a case in which “there were existing, completed liens on April 20, 1903, when the receiver was appointed.” In the opinion it was remarked:

“It should be observed that the statute which we have quoted makes no requirement, as do the statutes of some states, to the effect that giving or filing a

July 1920]

Opinion Per MITCHELL, J.

notice is a condition precedent to the creation of a lien. What might be the effect of such a requirement we have no occasion to consider."

The case of *Berwind-White Coal Mining Co. v. Metropolitan S. S. Co.*, 166 Fed. 782, cited by appellants, was a case of a maritime lien created under a statute of New Jersey, which provided for a completed lien upon any ship or vessel, her tackle, etc., simply upon the doing of any work or the furnishing of material or supplies for the building, repairing, fitting, furnishing or equipping such ship or vessel, and providing the lien should continue until paid.

The cases of *Totten & Hogg Iron etc. Co. v. Muncie Nail Co.*, 148 Ind. 372, 47 N. E. 703, and *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155, 51 N. E. 179, cited by appellants, simply hold as stated in the first of those cases:

"If appellant had acquired a lien upon the mill and other property of appellee, such lien could not be lost by the subsequent appointment of the receiver."

But such cases are not in point here where no lien had been acquired, or, as our statute puts it, "existed," at the time of the appointment of the receiver. The only authority found for the lien in this state is contained in the statutes; and in order to entitle one to the lien at all, the same must be perfected according to the statute. "The appointment of a receiver does not alter or affect the rights of the parties to property, or give or take from them any liens they have acquired or are entitled to." *Withrow Lumber Co. v. Glasgow Investment Co.*, 42 C. C. A. 61, 101 Fed. 863, and cases cited. It in no way prevents one from filing his claim of lien in the office of the county auditor. It only changes the procedure and possibly postpones the collection.

In the present case, appellants' loss of priority of payment out of the insolvent estate is traceable to neglect to take care of themselves. The losses they suffer are those which ordinary care would have prevented. Lack of actual knowledge of the condition imposed by the city that the structures on the streets should be removed immediately after July 7 is not so important, for, manifestly, inquiry of the officers of the corporation staging the celebration, or inquiry at the city hall, would have disclosed the condition, and besides, the very fact that the structures were built upon public streets of the city was a constant and lively suggestion that the occupancy was transient and fleeting. Nevertheless, appellants stood by, after ceasing to furnish material on June 30, until the court in protection of the rights of other creditors of the insolvent corporation appointed a temporary receiver on July 9, until a permanent receiver was appointed on July 16, through whom a sale was afterwards made by direction of the court, without having filed their claims in the auditor's office. The right of the city to the use of its streets and the rights of other creditors are not to be thus subordinated to the delay and will of appellants, who seek to have a court of equity relieve them from their failure to comply with the mandatory terms of the statute in the face of ample unimproved opportunity to do so. Appellants' situation, under the circumstances existing here, is analogous to that of one who, having the right and ample opportunity to take steps essential to create a lien, fails to do so because of the appointment of a receiver, through which proceedings alone he attempts to assert a priority, of which situation it was well said upon a rehearing in the case of *Withrow Lumber Co. v. Glasgow Investment Co.*, 45 C. C. A. 321, 106 Fed. 363:

July 1920]

Statement of Case.

"The court cannot, upon the theory of keeping alive a right to secure an inchoate or incipient lien, create one. . . . Petitioner's contention would lead to this result,—that it would be entirely unnecessary to file a mechanic's lien in any case where a suit was instituted involving the administration of property upon which a lien was sought to be established. This would be a dangerous precedent to set, and would be far-reaching in its effect."

Upon the whole record, we are satisfied the judgment denying appellants any priority, but establishing their claims as those of common creditors, was right, and the judgment is affirmed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MAIN, JJ.,
concur.

[No. 15735. Department One. July 15, 1920.]

FRANK L. LOVEJOY *et al.*, Respondents, v.

S. L. AMERICUS *et al.*, Appellants.¹

APPEAL (338)—BRIEFS—TIME FOR SERVICE. A motion to strike respondent's brief, because filed out of time, will be denied when it was filed before the motion was made, and in time for service of a reply brief before the hearing.

EXECUTION (50)—SALE—VACATION—INADEQUACY OF PRICE. An execution sale of property of the value of \$4,000, for \$37.92 will be set aside where the debtors acted promptly on receiving notice, and the creditor failed to pursue simple and adequate remedies and had lulled the debtors into a sense of security by crafty silence during the period of redemption.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 2, 1919, upon findings in favor of the plaintiffs, in an action for equitable relief, tried to the court. Affirmed.

¹Reported in 191 Pac. 790.

S. L. Americus, F. W. Girard, Cordiner & Cordiner, and Ripley & Quackenbush, for appellants.

C. C. Upton, for respondents.

MITCHELL, J.—On August 9, 1917, the defendant S. L. Americus had an unsatisfied judgment against these plaintiffs in the sum of \$63.15, with interest from September 3, 1915, and costs, \$7.25, upon which he took out an execution and caused the sheriff to levy upon some six or seven detached parcels of real property of plaintiffs, situated in Spokane county. All the property was sold in bulk to the judgment creditor at sheriff's sale for \$87.92, the amount of the judgment, costs and increased costs. The sale was confirmed by the superior court, and in due time, September 17, 1918, a sheriff's deed was issued to the purchaser. Under date of January 25, 1919, Americus and wife made a quitclaim deed to the property to the defendant Samuel D. Rodibaugh of Westmorland county, Pennsylvania, and on the same day caused the deed to be recorded in the office of the auditor of Spokane county. Four days later this action was commenced against Americus and wife and Rodibaugh to set aside the sheriff's sale, certificate of sale and deed, and also the deed to Rodibaugh, upon the grounds of inadequacy of price, together with fraud in procuring the sheriff's sale and deed, and that the deed to Rodibaugh was without consideration and fraudulent. There was judgment for the plaintiffs, from which the defendants have appealed.

In their reply brief, which was served nearly five months after the service of respondents' brief, appellants moved for the first time to strike respondents' brief because it was not served within thirty days after appellants' opening brief had been served. The situa-

July 1920]

Opinion Per MITCHELL, J.

tion is similar to that in *Magnuson v. MacAdam*, 77 Wash. 289, 137 Pac. 485, upon which authority the motion is denied.

Upon the merits, in addition to what has been stated, from the pleadings and proof it very clearly appears that respondents and Americus and wife have been well acquainted and residents of Hillyard, Washington, some eight or ten years. Persistently, orally and by letters, respondents were requested to pay the judgment, down until the issuance of execution, after which nothing was said to them about payment. Respondents had no actual notice of the sheriff's levy and sale until the latter part of December, 1918—more than three months after the expiration of the redemption period. Upon learning of the situation, on more than one occasion, and as late as January 24, 1919, they offered to pay and tendered cash sufficient to satisfy the judgment, interest, costs and increased costs, and even offered to pay a reasonable amount to satisfy appellants for any trouble they had been put to. The tender was finally rejected on January 24, 1919, and the next day Americus and wife made and filed their deed to Rodibaugh. The tender made was kept good by respondents by a deposit in court upon commencing this suit five days later. There was an outstanding mortgage of \$1,000 on one piece of the property, but over and above that, the reasonable value of all the property included in the sheriff's sale and deed was in excess of \$4,000. One piece of the property was, and still is, the residence of respondents. Another piece of the property, of the value of \$2,500, and not used as a homestead nor for farming purposes, was regularly occupied by a tenant of respondents, yielding \$16 per month. Subsequent to the sheriff's sale, and for months after the statutory period of redemption,

Americus and wife stood silently by without making any demand or giving any actual notice, and permitted respondents to pay taxes, special assessments for municipal water mains, and for improving the buildings on the property in considerable sums.

A case very much like this in principle was considered in *Triplett v. Bergman*, 82 Wash. 639, 144 Pac. 899, wherein it was said:

“While the courts have expressed themselves in various language, we are of opinion that the sum and essence of the law upon the question involved in this case is that there is a discretionary power vested in the trial judge, and where it is made to appear that the sale would outrage the right of a judgment debtor if allowed to stand, his discretion will not be controlled, for, as is said in *Howell v. McCreery*, 7 Dana (Ky.) 388, where a judicial sale was challenged for inadequacy of the sum bid,

“‘Public policy and the analogies of the law require that they should be considered *per se* as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts.’

“This case is quoted in *Shroeder v. Young*, 161 U. S. 334, a case following *Graffam v. Burgess*, 117 U. S. 180, where the rule is stated thus:

“‘Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.’”

The judgment in the present case is entirely justified. The respondents acted promptly upon receiving notice that their property had been sold. Mr. Lovejoy was a teamster in the town of Hillyard and trusted nearly all his other business to his wife, who was, much of the time, almost an invalid. After the issuance of the execution, followed by the sheriff's sale, and while the rights of respondents were passing away by the lapse of time into the hands of appellant Americus, the con-

July 1920]

Opinion Per MITCHELL, J.

tinuous dunning theretofore engaged in was changed into an apparently wary and crafty silence, highly calculated to, and actually succeeding in, lulling the respondents into a sense of security until the year for redemption passed by. *Graffam v. Burgess*, 117 U. S. 180. The judgment, with interest and costs, could have been satisfied, prior to the execution, by garnishment proceedings against the tenant of respondents for less than five months' rental; while, during the period of redemption from the sheriff's sale, the amount of the judgment, interest and costs, and increased costs of \$87.92, could have been satisfied by less than six months' rental from the same tenant, to which appellants, as purchasers at the sheriff's sale, were entitled under the provisions of § 602, Rem. Code.

The obviously studied course of the judgment creditor in refusing or failing to pursue those plain, simple and adequate ways to collect, constitute in part that unfairness which, coupled with the shockingly inadequate price for which they purchased at the execution sale, fully warranted respondents in their appeal to a court of equity for relief, under the rule stated in *Triplett v. Bergman*, *supra*.

The findings and conclusion of the trial court that the quitclaim deed to Rodibaugh was not made in good faith and should be cancelled were fully warranted by the pleadings and other portions of the record, which require no recital or analysis in this opinion.

Judgment affirmed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MAIN, JJ.,
concur.

[No. 15528. *En Banc*. July 15, 1920.]

C. L. VICKERS *et al.*, Respondents, v. MACHINERY
WAREHOUSE & SALES COMPANY *et al.*,
Appellants.¹

BANKS AND BANKING (31)—EVIDENCE (7)—JUDICIAL NOTICE. The courts must take judicial notice of the custom of attaching bills of lading to drafts and passing them along for collection.

BANKS AND BANKING (20, 31)—DEPOSITS FOR COLLECTION—DRAFT WITH BILL OF LADING ATTACHED—TITLE. A bank becomes the absolute owner of a draft drawn by a depositor upon a person at a distance, and unrestrictedly indorsed and accepted for deposit subject to private check; and it is immaterial that the same was forwarded for collection attached to a bill of lading for goods shipped and to be delivered to the drawee on payment of the draft.

SAME. It is also immaterial that the bank intended to charge interest on the amount advanced until payment of the drafts.

SAME (31, 33)—DRAFTS—TITLE TO PROCEEDS. In such a case, it is immaterial that, by the universal custom of bankers, the bank reserved the right to charge the amount back to the depositor in case of failure to collect the draft.

GARNISHMENT (56)—DEPOSITS IN BANK. The proceeds of a draft sent to a bank for collection cannot be garnished on a claim against the drawer where the bank became the absolute owner of the draft.

APPEAL AND ERROR (421)—REVIEW—CONCLUSIONS OF LAW. A finding upon undisputed facts, that a bank received a draft for collection and did not become the owner, is a conclusion only, and not binding upon the supreme court upon appeal.

BANKS AND BANKING (31)—RELATION BETWEEN BANK AND DEPOSITOR FOR COLLECTION—RIGHT TO CHARGE BACK AFTER COLLECTION. A bank having through its agent or correspondent bank collected a draft, drawn by its customer and deposited to the customer's private checking account, has no right to charge back any part of the amount.

Cross-appeals from a judgment of the superior court for King county, Ronald, J., entered March 1, 1919, upon findings in favor of the plaintiff, against a garnishee defendant, after a trial to the court. Reversed.

¹Reported in 191 Pac. 869.

July 1920]

Opinion Per BRIDGES, J.

Kerr & McCord (Wm. Z. Kerr, of counsel), for appellants.

S. H. Kelleran, for respondents.

BRIDGES, J.—In January, 1918, the defendant Machinery Warehouse & Sales Company, which we will hereafter speak of as the "Machinery Company," doing business in the state of Illinois, sold to Vickers & Sons & Company, respondent and cross-complainant, of Seattle, Washington, often spoken of herein as the purchaser, a fifteen ton crane for the sum of \$8,800. The machinery company made certain warranties of the crane, and, among the rest, one that it would pass Seattle inspection. The purchaser was to pay down before shipment \$2,800, and thereafter, within due course, the crane was to be shipped to the purchaser at Seattle, and at the time of shipment the machinery company was to make a sight draft on the purchaser for the balance of the purchase price, to wit, \$6,000. In compliance with this contract, the purchaser paid \$2,800 in cash to the machinery company. This sum was paid by sending a Seattle draft to the machinery company through the Continental & Commercial National Bank of Chicago. Shortly after the receipt of the first payment, the machinery company loaded and shipped the crane to the purchaser at Seattle. It drew a sight draft against the purchaser, payable to the order of the Continental & Commercial National Bank of Chicago, of which it was a regular customer, for the balance of \$6,000. The bill of lading was attached to the draft. This draft, with the bill of lading attached, was taken to the Chicago bank, and the latter, following its custom, deposited to the credit of the machinery company the whole of the \$6,000, which deposit was at all times subject to the private check

of the machinery company. The Chicago bank then indorsed the draft to the National Bank of Commerce, in Seattle, the appellant, as follows:

“Pay to the Order of National Bank of Commerce without recourse on this bank, either as principal or agent, as to the quantity, quality or delivery of any goods covered by this draft, bill or bills of lading or other documents attached hereto, or herein referred to.

“Continental & Commercial National Bank of Chicago,
W. W. Lampart, Cashier.”

The draft so indorsed, together with the attached bill of lading, was immediately sent on to the appellant for collection. When the crane reached Seattle, the respondent examined it while it was still on the car, and found that it would not pass Seattle inspection because of certain defects. Notwithstanding the information thus obtained, the respondent paid the draft of \$6,000 to the appellant and took up the bill of lading. Before the appellant had remitted the \$6,000 to the Chicago bank, respondent brought suit in the superior court of King county, Washington, against the machinery company to recover \$2,500 damages on account of the breach of warranty that the crane would pass Seattle inspection. At the same time it caused to be issued out of the superior court of King county writs of garnishment and attachment and served the same upon the appellant while it had in its hands the identical \$6,000 which the respondent had so recently paid to it. Thereafter respondent found certain additional defects in the crane and amended its complaint against the machinery company, alleging additional breaches of warranty and seeking to recover damages in the sum of \$5,000. Additional attachments and garnishments were issued on this amended complaint and served upon appellant while it still had the \$6,000 paid to it in exchange for the draft and bill of lading. Very

July 1920]

Opinion Per BRIDGES, J.

soon after the commencement of this suit, both the Chicago bank and the machinery company were notified thereof. Respondent took judgment against the machinery company in the sum of \$5,000, and now seeks to hold sufficient of the \$6,000 paid appellant to satisfy that judgment.

The appellant answered the writs of garnishment and attachment, to the effect that it was not indebted to the machinery company in any sum, and that it did not have in its possession or under its control any personal property or effects belonging to it. The assistant cashier of the Chicago bank testified that, at the time the bank took the draft and bill of lading, there was no agreement or conversation between the machinery company and the bank concerning the terms or conditions upon which the latter should take the draft; that, following its custom, it discounted the draft, paying the full face thereof, and put the money to the credit of the account of the machinery company subject to its private check. He further testified that the bank bought the draft and became the owner of it; that, had the draft, or any portion of it, not been paid the bank, it, in accordance with universal custom, had and would have exercised the right to charge back the amount to the machinery company or look to that company for reimbursement. At the time the Chicago bank received notice that the \$6,000 had been garnished, the machinery company had on deposit with it \$3,000. It does not appear whether this balance of \$3,000 was a part of the \$6,000 which the bank had previously paid for the draft. The Chicago bank did not at any time charge any portion of the \$6,000 back to the machinery company. The Chicago bank intended to charge back to the machinery company an amount equal to the interest on the \$6,000 deposited to its

credit, for such period as might elapse between the time of such deposit and the payment of the draft. The trial court made findings substantially as we have set them out, but in addition thereto, found that the Chicago bank extended a conditional credit to the machinery company in the full amount of the draft, with the understanding that the bank would act as agent for the machinery company in the collection of the draft, and that it received the draft, not to be treated as cash, but merely as collateral, and that at no time did the bank or the machinery company have any intention that the bank would become the purchaser or owner of the draft. The court's conclusion was that \$3,000 of the \$6,000 in the hands of the appellant were subject to the garnishment, and judgment was thereafter entered in accordance with such conclusions. From this judgment, the garnishee defendant has appealed. The respondent has cross-appealed.

The question involved in both the appeal and the cross-appeal is, How much, if any, of the \$6,000 in the hands of the appellant was subject to garnishment and properly applicable on respondent's judgment against the machinery company? A correct answer to this question depends upon the answer to another question: To whom did the money belong at the time of the service of the writ of garnishment?

There is a maze and tangle of authorities on this question. Much has been said in the briefs concerning the fact that the bill of lading was attached to the draft. We have come to the conclusion that the bill of lading does not and cannot in any way affect the decision of the case. The custom of attaching bills of lading to drafts and thus passing the drafts along for collection has become so universal that the court must take judicial notice of the procedure. A bank has

July 1920]

Opinion Per BRIDGES, J.

power to purchase a draft, but ordinarily it has not power to purchase machinery, and the purchase of a bill of lading would be the purchase of the machinery represented by it. Nor is a bank, even if it had the power, engaged in the business of purchasing machinery or other property the title to which is represented by a bill of lading. After all is said and done, the bill of lading is nothing more nor less than a bill of sale and is attached to the draft purely as a matter of convenience in the transaction of business, and in order that the bill of lading, which is the evidence of the title, will not be delivered before the draft is paid. *Lewis Leonhardt & Co. v. Small & Co.*, 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. (N. S.) 887; *California Savings Bank v. Kennedy*, 167 U. S. 362; *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427. The fact that a bill of lading was attached to the draft cannot alter the legal relationship between the Chicago bank and the machinery company concerning their rights or privileges in the draft.

When a bank takes a draft drawn on a person who resides at a distance, it becomes one of three things: (1) A simple collector or agent of the drawer; (2) an absolute purchaser and owner of the draft; or (3) a conditional owner thereof. When the bank acts only as agent of the drawer, it becomes a collector and nothing else. The maker of the draft is its unconditional owner till it is paid. When it is paid the bank becomes the owner of the proceeds and the debtor of the maker of the draft. If, however, the bank takes the draft and discounts it, and pays to the drawee the amount thereof, then, and under those circumstances, it is manifest that the bank has become something more than a collector or agent and has either a qualified or absolute ownership of the draft. When we speak of

one being the qualified owner, we mean any interest less than that of complete ownership, which would include the idea of a lien on the draft or holding it as security for moneys advanced.

Generally speaking, whether a bank becomes a simple agent for collection, an absolute owner, or a qualified owner, will depend on the circumstances surrounding the deal and the agreement between and the intention of the parties. Much the greater number and weight of authorities is to the effect that, where one brings a check or draft to his bank, and such check or draft is made payable to the bank or is unrestrictedly indorsed to it, and requests that the amount thereof be put to his credit subject to his private check, and the bank complies therewith, and nothing else is said or done, it will be conclusively presumed that the bank has become the unqualified and absolute purchaser and owner of the check or draft, and consequently the absolute and unqualified owner of any proceeds to be derived therefrom. We think the theory is sound. It agrees with the idea and view generally accepted by business; it is the natural and unstrained construction of the action of the parties, and has the additional virtue of definitely fixing and at once defining the legal relationships of the parties in many check and draft transactions. Of course, this rule would not apply where the bank pays or advances an amount materially less than the face of the check or draft and it is understood that the bank is to pay an additional sum when it has made collection. The correct rule, we think, is stated in 3 R. C. L. 524:

“When a check or other commercial paper is deposited in a bank, indorsed for collection, or where there is a definite understanding that such is the purpose of the parties at the time of the deposit, there is no question that the title to the paper remains in the

July 1920]

Opinion Per BRIDGES, J.

depositor. . . . If, on the other hand, there is a definite understanding at the time of the deposit that such paper is deposited as cash, it is clear that the title passes to the bank. But, where a check indorsed in blank is deposited without any definite understanding as to the way it is to be treated, but is credited by the bank to the depositor as cash, and is so entered upon the depositor's pass book, the question frequently arises whether the title to the check passes immediately to the bank, or remains in the depositor. *Prima facie*, according to the weight of authority, the passing to the credit of the depositor, of a check bearing an indorsement not indicating that it was deposited for collection merely, passes the title to the bank. Still, according to the weight of authority, the rule above stated is not an absolute rule, and is *prima facie* merely, and yields to the intention of the parties, expressed or implied from the circumstances."

The supreme court of the United States has fully passed upon this question in the case of *Burton v. United States*, 196 U. S. 283. There Mr. Justice Peckham said:

"There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check

by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed."

The court in that case further held that the trial court erred in submitting to the jury the question as to whether or not the bank became the absolute owner or purchaser of the check, stating that the testimony showed that it did become such owner and that there was nothing to submit to the jury. The following are a few of the cases supporting the doctrine which we have announced: *Thompson v. Riggs*, 5 Wall. (U. S.) 663; *Commercial Bank of Albany v. Hughes*, 17 Wend. (N. Y.) 94; *Metropolitan National Bank v. Lloyd*, 90 N. Y. 530; *Taft v. Quinsigamond National Bank*, 172 Mass. 363, 52 N. E. 387; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048; *In re State Bank*, 56 Minn. 119, 57 N. W. 336; *Lewis Leonhardt & Co. v. Small & Co.*, *supra*; *Goetz v. Bank of Kansas City*, 119 U. S. 551; *Walker & Brock v. Ranlett*, 89 Vt. 71, 93 Atl. 1054; *Scott v. McIntyre Co.*, 93 Kan. 508, 144 Pac. 1002, L. R. A. 1915 D 139; 5 Cyc. 497.

It has been argued that the fact that the Chicago bank took this draft considering that it had the right to charge the same back to the machinery company if it were not paid, shows that the bank did not become the absolute owner of the draft; that it could not maintain the dual position of being the absolute owner and at the same time reserve the right to charge back if the draft were not paid. This argument is fully answered by the supreme court of the United States in *Burton v. United States*, *supra*, when it says:

"The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against

July 1920]

Opinion Per BRIDGES, J.

the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more."

In the case of *Noble v. Doughten*, *supra*, the court, in a case where the facts were very similar to those here, held that the bank became the absolute owner of the draft, and commenting on the argument that the power to charge back would change the character of the ownership, said:

"It may be conceded that if, after due and legal effort to collect the check, it should be dishonored, the bank would have the right to charge the amount of it to the depositor's account. Whether this right may be said to rest merely on the custom of banks, or whether the custom has been crystallized into a rule, and the right now may be said to be an implied condition attaching to the transfer of the paper, makes no difference. It is, nevertheless, in strictness, the right of an indorsee against an indorser, and hence is not in any sense inconsistent with ownership."

In the case of *Scott v. McIntyre Company*, *supra*, discussing this exact question, the court said:

"We cannot regard the right of a bank receiving a draft for deposit to charge the amount back to the depositor if payment is refused, as having a determining influence. Such a right on the part of the bank would seem to be an ordinary incident even of a deposit which is accepted as cash. The transaction is based on the supposition that the draft is going to be paid. A guaranty of payment often results from the indorsement, but, however evidenced, it should not militate against the theory of a passing of the title."

To the same effect see: *Ayres v. Farmers' & Merchants' Bank*, 79 Mo. 421; *First Nat. Bank v. Armstrong*, 39 Fed. 231; *Walker & Brock v. Ranlett*, *supra*; *Brooks v. Bigelow*, 142 Mass. 6, 6 N. E. 766; *American*

•

Trust & Savings Bank v. Gueder Mfg. Co., 150 Ill. 336, 37 N. E. 227.

The fact that the bank intended to collect from the machinery company an amount equal to interest on the sum advanced by the bank to the machinery company, during the period from such advancement until the payment of the draft, could not have the effect of making the bank a collector or conditional owner of the draft. The bank paid the machinery company the full amount of the draft. If it had deducted a reasonable sum for the use of the money, instead of waiting until the draft was paid, it could not be argued that such would have had the effect of lessening the bank's ownership of the draft. That the bank did not take out this discount when it bought the draft was for the convenience of the parties, for the reason that, at that time, no one could tell how long it would be before the draft would be paid.

We frankly concede that the conclusion to which we have come and the reasons for such conclusions are opposed to the theory and reasoning of some of the earlier decisions of this court. In the case of *Washington Brick, Lime & Mfg. Co. v. Traders National Bank*, 46 Wash. 23, 89 Pac. 157, this court, in substance, held that, under facts similar to those involved in this case, the bank did not become the owner of the draft; that it could not logically maintain the position of absolute owner and at the same time have the right to charge back. In the case of *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912, we held that the claim or the exercise of the right to charge back was not consistent with the theory of ownership. Substantially the same holding is found in the case of *American Savings Bank & Trust Co. v. Dennis*, 90 Wash. 547, 156 Pac. 559. But the more recent case of

July 1920]

Opinion Per BRIDGES, J.

Old National Bank v. Gibson, 105 Wash. 578, 179 Pac. 117, expressly overruled the case of *American Savings Bank & Trust Co. v. Dennis*, above, and, in our opinion, overruled the theory upon which the other Washington cases cited were decided. In the *Old National Bank* case, the facts were that Gibson gave one White his check on the Fidelity National Bank of Spokane. White took the check to the Old National Bank of Spokane and the amount thereof was deposited to his private account at that bank. But the deposit slip on which the check was listed provided that "Items other than cash are received on deposit with the express understanding that they are taken for collection only." The court held that the deposit so made by White was a conditional credit, and that the bank took the check, not as owner, but for collection. Later, however, White presented his private check for the whole amount of his private account and the bank paid the same. We held that, while the deposit in the first instance was a conditional credit and the bank did not become the owner of the check, yet, when later the depositor presented his check for the whole amount and the bank elected to and did pay it, the original relationship was changed and the bank became the owner of the check. While the facts of that case are not identical with the facts of this case, yet the reasoning there is the reasoning we have applied here.

In what we have said we do not necessarily hold that those earlier cases were wrongly decided; we go no further than to hold that much of what is said in them is contrary to the great weight and number of decided cases and is not in harmony with the views of the business public in such transactions, which views have ripened into a general commercial custom.

Having decided that the Chicago bank became the

unqualified owner of the draft, it must follow that the money which was paid to its agent and correspondent, the appellant herein, to take up the draft was the property and money of the Chicago bank, and that the machinery company had no interest therein, and that the attempted garnishment was futile. We have not overlooked the fact that the trial court found that the Chicago bank received the draft simply for collection and that it did not become the purchaser thereof. That so-called finding was a conclusion. While we always pay great deference to the findings made by the lower court based upon the evidence, it is the duty of this court to draw its own conclusions. We think the learned trial court erred.

But had we followed the reasoning of our earlier cases on this subject, the ultimate result in this particular case must have been its reversal. If it be conceded that the Chicago bank did not become the owner of the draft, then it must be held that the transaction amounted to an equitable assignment to it of such portion of the proceeds of the draft as was necessary to repay it the amount it had advanced to the machinery company, which, indeed, was the full face of the draft and the total amount it had collected. The bank would have been the conditional owner of the draft and the machinery company the conditional owner of the money which had been paid to its credit in that bank. Till the draft was paid, the bank would have had the right to charge back to the machinery company the amount it had advanced, and the machinery company would have had the right to recall the draft. But this conditional relationship would have terminated when the draft was paid. At that time the bank would become the absolute owner of the proceeds of the draft and the machinery company its unconditional creditor.

July 1920]

Opinion Per BRIDGES, J.

After the payment of the draft, the bank would have had no right to charge back anything to the machinery company. The loan or advancement the bank had made would have been paid when the draft was paid. But it is argued that, when the Chicago bank learned of this litigation, the machinery company had on deposit with it the sum of \$3,000, and that it was the duty of the bank at that time to charge back that sum. But the bank had no right so to do because the machinery company was not at that time indebted to the bank in any sum, the draft money having paid any indebtedness which it theretofore owed. . *Fourth National Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891; *Central Mercantile Co. v. Oklahoma State Bank*, 83 Kan. 504, 112 Pac. 114, 33 L. R. A. (N. S.) 954.

Suppose that, after the draft was paid, the Chicago bank had undertaken to charge back to the machinery company, the latter could rightfully have answered that it owed the bank nothing, and that the loan or advancement made by the bank had been paid by the very money which it then had in its hands. When this garnishment was served, neither the appellant nor the Chicago bank was indebted to the machinery company, or had any money in its hands in which the machinery company had any interest.

The judgment is reversed, and the cause remanded with instructions to dismiss the appellant out of the case.

ALL CONCUR.

[No. 15863. Department One. July 15, 1920.]

C. T. HARDINGER, *Respondent*, v.

J. WALTER HAINSWORTH *et al.*,

Appellants.¹

GUARANTY (2)—NATURE OF OBLIGATION—ENFORCEMENT—WAIVER OF RIGHTS. Where a guarantor of the purchase price of property, in consideration of forbearance and to prevent the running of the statute, in writing "renewed" his original guaranty, it became an original obligation notwithstanding it was called a guaranty.

EQUITY (46)—LACHES AND STALE DEMANDS—FOLLOWING STATUTE. Laches does not bar a right of action upon the renewal of a written guaranty, which was given in consideration of forbearance to sue and to prevent the statute from running, where action was commenced within the statutory period after the second writing was entered into, and the action was between the original parties.

APPEAL (469)—REVIEW—HARMLESS ERROR—JUDGMENT OR ORDER—TENDER. In an action upon a guaranty of payment of the purchase price of land sold, defendant cannot complain that plaintiff did not tender a deed of the land conveyed to him, where the judgment recites that, upon its payment, the plaintiff shall convey the property to the defendant, as he is not prejudiced.

DAMAGES (66)—GUARANTY (9)—MEASURE OF DAMAGES FOR BREACH OF CONTRACT. The measure of damages for breach of a contract guaranteeing the payment of the purchase price of land, is the balance due upon the price, plus interest and taxes.

Appeal from a judgment of the superior court for King county, Hall, J., entered January 3, 1920, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Roberts & Skeel and *L. B. Schwellenbach*, for appellants.

C. T. Hardinger, for respondent.

MAIN, J.—This action was based upon a writing called a guaranty. The cause was tried to the court

¹Reported in 191 Pac. 755.

July 1920]

Opinion Per MAIR, J.

without a jury, and resulted in findings of fact, conclusions of law and judgment sustaining the plaintiff's right to recover. From this judgment, the defendants appeal. The facts may be summarized as follows:

Prior to September 15, 1909, the appellants, being then the owners of certain real property in the city of Seattle, sold the same on written contract to one Clarence V. Atkinson. A small payment was made upon the contract at the time of this execution, and the balance was to be made in monthly installments. On September 15, 1909, the appellants transferred the contract to the respondent in this action, and at the same time executed and delivered to him a quitclaim deed covering the same property. The assignment was written upon the back of the contract and recited: "We hereby guarantee the payment of the balance of the purchase price, with interest." Atkinson made the monthly payments upon the contract to the respondent until July, 1910, since which time no payments have been made. On January 15, 1911, the appellant J. Walter Hainsworth procured a quitclaim deed from Atkinson conveying the property to the respondent. Thereafter, at the suggestion of Hainsworth, the respondent listed the property for sale. He was directed to go ahead and sell and "try to get your money out of it." The property was not sold, and no payments having been made on the contract subsequent to July, 1910, on September 9, 1915, the appellants signed a second writing which recites:

"For the purpose of preventing the running of the statute of limitation and in consideration of his forbearance to commence suit against us at this time, we hereby renew in favor of C. T. Hardinger, our written guaranty endorsed upon the back of the contract of purchase issued by us to Clarence V. Atkinson."

This writing further recites that it is a renewal, upon the same terms and conditions as set out in the original contract "of assignment and guaranty endorsed upon said contract." It is upon this writing that recovery is sought in the present action.

The appellants first claim that this is a guaranty contract and that the respondent has waived his right to proceed thereon because of the lapse of any right of action against Atkinson. The quitclaim deed which the latter gave was procured by Hainsworth, and was delivered to the respondent by him, the apparent purpose being to get the title to the property in such condition that it could be easily transferred in the event of a sale. While the evidence does not make it very clear, it is apparent that the respondent only held the title as security for the money which he had paid to the appellants at the time he took the assignment. Admitting, but not deciding, the general rule to be as claimed by the appellants that, if the right of action is permitted to lapse against the principal obligation, the guarantor is released, it is not applicable to the facts in this case. The appellants having secured the deed from Atkinson and having advised the respondent to sell the property, they cannot complain because the title to the property, by the deed from Atkinson, was merged in respondent. The writing upon which the action is based refers to the prior writing by which the payment of the purchase price with interest is guaranteed. The obligation, while called a guaranty by the parties, became in effect an original obligation of the appellants. *Ekre v. Cain*, 66 Wash. 659, 120 Pac. 523.

The second contention is that the respondent was guilty of laches in failing to bring an action within a reasonable time, and therefore is estopped to assert

July 1920]

Opinion Per MAIN, J.

any right in the contract sued upon. When the statute of limitations was about to run upon the first writing, as recited in the second, for the purpose of preventing the running of the statute, that writing was made. The present action was brought before the statute of limitations had run upon the second writing. The record discloses no reason for invoking the doctrine of laches; it was the apparent intent of the parties, when the second writing was entered into, that a right of action should be kept alive for the statutory period. The case of *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910, much relied upon by the appellants, was upon different facts. There the action was between the original parties to the contract. The seller, after all the payments had become due thereon, delayed bringing the action for the purchase price for such length of time that it was held that he had elected by his silence to accept a forfeiture of the contract. This case, upon the facts as above stated, is not within the holding in that case.

The appellants further contend that, since the respondent did not tender a deed prior to the time of the signing of the judgment, his right of recovery is defeated. The complaint alleged, among other things, that "the plaintiff herewith tendered to the defendants a deed to said above mentioned lots upon payment of the amount due." The judgment recites that, upon payment by the appellants to the respondent of the sum of \$950.92, with interest, the respondent shall convey the property to the appellants. It thus appears that the payment of the judgment is conditioned upon making and executing the deed. Even though the deed should have been tendered prior to the signing of the judgment, the appellants have not been prejudiced by failure of the respondent so to

do, and the judgment should not be reversed for this reason.

Finally, it is contended that the trial court did not apply the correct measure of damages. As we understand the record, the recovery allowed was for the balance of the purchase price plus interest and taxes. These are the sums that were covered by the writings between the parties to this action, and there was no error in the measure of damages allowed.

The judgment will be affirmed.

HOLCOMB, C. J., PARKER, TOLMAN, and MITCHELL, JJ.,
concur.

[No. 15845. Department One. July 16, 1920.]

JOHN R. O'REILLY, INCORPORATED, *Appellant*, v.
BERT O. TILLMAN *et al.*, *Respondents*.¹

PLEADING (119)—ANSWER—AMENDMENT—DISCRETION. It is not an abuse of discretion to allow an answer to be amended at the trial by withdrawing an admission where there was no showing that the plaintiff was misled.

MORTGAGES (20) — ABSOLUTE DEED AS MORTGAGE — EXISTENCE OF DEBT TO BE SECURED. The relation of mortgagor and mortgagee is not created upon the placing in escrow of a deed and notes for money advanced where both deed and notes were to be returned to the maker if paid, and if not paid, the notes were to be returned to him and the deed delivered to the grantee; since it is clear there was no intent to create an enforceable debt secured by mortgage.

FRAUDS, STATUTE OF (9)—ORAL AGREEMENT FOR LAND—REDEMPTION FROM MORTGAGE. An oral agreement to permit the grantor in an escrow deed one year in which to redeem the property, relates to real property, within the statute of frauds, and is unenforceable.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 9, 1919, upon granting a nonsuit, dismissing an action for equitable relief, tried to the court. Affirmed.

¹Reported in 191 Pac. 866.

July, 1920]

Opinion Per MAIN, J.

James Kiefer, for appellant.*Poe & Falknor*, for respondents.

MAIN, J.—As indicated by the allegations of the complaint, this was an action to compel the reconveyance of certain real estate, and for an accounting for the rents, issues and profits thereof. The action was in effect one to have the defendants, who were in possession of the property under a deed, declared to be mortgagees. In the answer the defendants had admitted making a loan to the plaintiff. When the case was called for trial, they asked permission to amend their answer by withdrawing this admission, which was granted. The case proceeded to trial before the court without a jury, and at the conclusion of the plaintiff's case, the defendant moved to dismiss the action because a case had not been made out. This motion was sustained and the judgment of dismissal entered. From this judgment, the plaintiff appeals. The appellant is a corporation organized under the laws of this state, and for convenience will be referred to here as O'Reilly. The respondents are husband and wife.

Appellant was the owner of certain real estate in the city of Seattle which was incumbered by two mortgages. On December 18, it, having further obligations to meet, made a note in the sum of \$675, payable to Tillman, due thirty days after date. At the same time the appellant executed a statutory warranty deed naming the respondents as grantee therein. The note and deed were not delivered to the respondents, but placed in escrow with the Dexter Horton Trust and Savings Bank. The escrow agreement recites that the deed and note are to be delivered to O'Reilly, the appellant, on or before January 17, 1919, upon the condition that

the note be paid according to its tenor. The directions to the escrow holder contained the following:

"You will carry out instructions as stated above, and if not complied with at maturity, return said deed to B. O. Tillman and said note to T. R. O'Reilly, Inc."

This agreement was executed on December 19, 1918, and signed by O'Reilly and Tillman. The note, when it became due, was not paid and a thirty-day extension was granted. On February 18, when the time covered by the extension expired, the parties withdrew the escrow, the note was returned to O'Reilly, and the deed delivered to Tillman. On the same date, the deed was filed for record. When these papers were withdrawn, a second escrow agreement was made under date of February 18, 1919. O'Reilly at this time made a note for the sum of \$725, payable to Tillman. Tillman and wife executed a quitclaim deed covering the same real estate which was covered in the prior deed from O'Reilly to them. The note and quitclaim deed were placed in escrow with the same holder as in the former agreement. This escrow recites that the note and deed, on or before March 18, 1919, was to be delivered to O'Reilly upon condition that the note was paid according to its tenor. The direction to the escrow holder was as follows:

"You will carry out instructions as stated above, and if not complied with at maturity, return said note to John R. O'Reilly, Inc., and said deed to Burt O. or Martha M. Tillman on demand."

On March 17, 1919, a third escrow agreement was entered into. At this time a note for \$700, executed by O'Reilly and payable to Tillman, was made. The note was placed in escrow, together with the quitclaim deed above mentioned. The escrow agreement recites that the note and deed are to be delivered to O'Reilly

July 1920]

Opinion Per MAIN, J.

on or before May 18, 1919, upon the condition that the note is paid according to its tenor. The direction to the escrow holder was as follows:

"You will carry out instructions as stated above, and if not complied with at maturity, return said note to John R. O'Reilly, Inc. and said deed to Burt O. or Martha M. Tillman."

This last note was not paid. A day or two before May 18, 1919, when it became due, the parties withdrew the papers from escrow, returned the deed to Tillman and the note to O'Reilly. Soon thereafter Tillman went into possession of the property, paid off the second mortgage, expended money in its repairs and improvements, and collected the rents. It is to be noted from the facts stated that, under no one of the three escrow agreements, was any of the three notes at any time to be delivered to any one other than O'Reilly, the maker. Under the first escrow, the note was to be returned to O'Reilly, if paid, also the deed. It not being paid when the extension granted expired, the note was returned to O'Reilly and the deed delivered to Tillman. Under the second escrow, if the note was paid, the note and deed were to be delivered to O'Reilly. If not paid, the note was to be returned to O'Reilly and the deed to Tillman or wife. Under the third escrow, the same disposition of the note and deed was to be made as under the second, that is, the note, if paid, was to be returned to O'Reilly and the deed delivered to him; if the note was not paid, it was, in this event, to be returned to O'Reilly and the deed delivered to Tillman or wife.

Error is first assigned upon the ruling of the court permitting the answer to be amended, as above stated, when the cause was called for trial. This is a matter which is largely in the discretion of the trial court,

and unless the appellate court can see that that discretion has been abused, it will not be interfered with. In the case of *Gould v. Gleason*, 10 Wash. 476, 39 Pac. 123, the amendment there permitted operated to mislead the plaintiff. In the case of *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789, the amended answer was filed after the issues had been joined, and it was there held that the trial court had not abused its discretion in permitting the amended answer. In that case it was said:

“Much discretion is vested in the superior court in this particular, and, unless the appellate court can see that that discretion was abused, it will not be interfered with. In addition to this, there was no application for additional time to prepare for the defense to what are termed new allegations in the answer.”

In the present case, there is no showing that the appellant was misled by the answer as amended, or that it made any application for additional time to prepare for its defense thereto. The trial court, in permitting the amendment, did not abuse its discretion.

Upon the merits, the question is whether the relation between the parties, as disclosed by the facts, was that of mortgagor and mortgagee. If this were the relation, it may be admitted that the proper judgment was not entered. If the relation of mortgagor and mortgagee did not exist, then the case was rightly decided by the superior court. When it is sought to establish that a deed is in fact a mortgage, the primary question, as pointed out in *Hoover v. Bouffleur*, 74 Wash. 382, 133 Pac. 602, is “the true intent as it is to be gathered from the whole transaction.” In determining whether the transaction did in fact create the relation of mortgagor and mortgagee, as stated in *Plummer v. Ilse*, 41 Wash. 5, 82 Pac. 1009, “the principal test

July 1920]

Opinion Per MAIN, J.

to be applied is whether the relation of the parties towards each other of debtor and creditor continued after the execution of the deed." To create the relation of mortgagor and mortgagee it is essential that there should be a debt capable of enforcement by action and which was intended to be secured by a mortgage. In *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61, upon this question it is said:

"To have created the relation of mortgagor and mortgagee between the parties, it was essential that there should have been a debt capable of enforcement by action, and which was intended to be secured by the mortgage. There could be no debt when there was no liability therefor. A mere privilege to pay did not impose an obligation so to do."

In the present case, the facts stated show that the parties were careful to avoid creating a debt which could be enforced by action and which was intended to be secured by a mortgage. At no time, under any of the escrow agreements, were the promissory notes, or any of them, to be delivered to the respondents. If an action had been brought, claiming that there was a debt capable of enforcement and which was intended to be secured by the deed as a mortgage, the appellant would well have answered that it was not thus liable because, by the agreement of the parties, if the note was not paid it was to be returned to the maker, the appellant, and the respondents' only right was to the possession of the deed. The whole transaction shows that the true intent was not to create the relation of mortgagor and mortgagee. It is true, as pointed out in *Beverly v. Davis*, 79 Wash. 537, 140 Pac. 696, that the rule is, "once a mortgage, always a mortgage;" but, under the facts in the case now before us, the relation of mortgagor and mortgagee has at no time existed. A careful examination of all the cases cited

by the appellant to sustain its position shows that, in each of them, there was an intent to create a debt capable of enforcement by action and which was intended to be secured by the mortgage. The present case does not fall within the rule of those cited, but comes within the rule of the case of *Reed v. Parker*, *supra*.

It is said, however, that, when the papers in the third and last escrow agreement were withdrawn, there was an oral agreement between the parties that the appellant should be allowed one year in which to redeem the property. If there were such an agreement, it was one relating to real property and, under the statute of frauds, unenforceable.

The judgment will be affirmed.

HOLCOMB, C. J., MACKINTOSH, PARKER, and MITCHELL, JJ., concur.

[No. 15830. Department Two. July 16, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v.
WILLIAM GOTTSTEIN, *Appellant*.¹

HOMICIDE (121)—TRIAL—INSTRUCTIONS AS TO LESSER OFFENSE. In a prosecution for murder, an instruction should not be given as to manslaughter, where the evidence excludes the possibility that the killing occurred without design, except that it was done in an attempt to commit robbery which is murder in the first degree.

CRIMINAL LAW (452)—HOMICIDE (401)—APPEAL—HARMLESS ERROR—INSTRUCTIONS INVITED. Error cannot be predicated upon submitting the question of murder in the second degree, where accused requested the submission of second degree murder and manslaughter.

CRIMINAL LAW (135)—EVIDENCE—SELF-SERVING DECLARATIONS. In a prosecution for homicide, defendant's statements to his wife as to his movements are inadmissible as self-serving declarations, where he did not testify and there was no evidence to impeach him.

¹Reported in 191 Pac. 766.

July 1920]

Opinion Per TOLMAN, J.

SAME (102)—EVIDENCE—RES GESTAE—STATEMENTS OF ACCUSED. In a prosecution for homicide, the defendant's statements to his wife after returning home on the day the crime was committed, are too remote in time to be admissible as part of the *res gestae*.

WITNESSES (88)—EXAMINATION—REDIRECT EXAMINATION—SCOPE AND EXTENT. Where, in a prosecution for homicide, defendant's cross-examination of a witness developed that witness had written a name on a slip of paper, which was sealed up and to be opened only in case witness disappeared, accused cannot complain that redirect examination disclosed the name of defendant as the person accused by the witness.

Appeal from a judgment of the superior court for King county, Hall, J., entered May 3, 1919, upon a trial and conviction of murder. Affirmed.

Walter B. Allen, for appellant.

Fred C. Brown, Chas. Ethelbert Claypool, and John D. Carmody, for respondent.

TOLMAN, J.—Appellant was, by information filed in the superior court for King county, charged with the crime of murder in the first degree. From a verdict of guilty of murder in the second degree and a judgment and sentence based thereon, the case is brought here for review on appeal.

The first assignment of error is that the court erred in refusing to submit to the jury by proper instructions the crime of manslaughter. In *State v. Palmer*, 104 Wash. 396, 176 Pac. 547, it is said:

“It would seem from this that the voluntary killing upon sudden heat, which was formerly included in the crime of manslaughter, has been taken out of that classification by the act, and, as the law now stands, every killing which is accompanied by a design to kill is either murder in the first degree or murder in the second degree, depending upon whether that design was or was not accompanied by premeditation. No longer is the intentional killing upon sudden heat, or the intentional killing, no matter how provoked, classi-

fied as manslaughter. And as soon as it appears that the killing was with a design to effect death, the element of manslaughter disappears from the case. That grade of homicide is characterized by the fact that the one guilty of it possessed no design to kill. If the purpose to kill is present, the offense must be murder in one of its degrees."

The law as thus stated is not criticized, but it is argued that it must affirmatively appear from the evidence that the crime of manslaughter is excluded before the court will be justified in refusing to submit that crime to the jury. It has been frequently held that, where the evidence excludes the lesser offense, such lesser offense should not be submitted to the jury. *State v. Kruger*, 60 Wash. 542, 111 Pac. 769, and authorities there cited. The statute, Rem. Code, § 2167, provides that, upon an indictment or information for an offense consisting of different degrees, the jury may find the accused not guilty of the degree charged, and guilty of any inferior degree, and therefore the correct rule is that the lesser crime must be submitted to the jury along with the greater, unless the evidence positively excludes any inference that the lesser crime was committed, and it is not incumbent upon the defendant, before such an instruction will be given, to show facts from which a jury might draw the conclusion that the lesser crime and not the greater was, in fact, committed; still we think the trial court was right in this case in refusing to submit the crime of manslaughter, for, after a careful study of the record, we think the evidence excludes the possibility that the killing occurred without design, except possibly that it was done in an attempt to commit robbery, which is expressly made murder in the first degree by our statute. Considering all of the circumstances shown, the nature of the wound, and the point where the bullet entered at

July 1920]

Opinion Per TOLMAN, J.

the left and rear part of the head of deceased, we cannot conceive that the shot was fired in self-defense, and even if so fired, the killing would have been excusable or justifiable and no crime, either of murder or manslaughter, would have been committed, and no instruction as to manslaughter would have been pertinent.

While the trial court, as we view the evidence, would have been justified in submitting to the jury first degree murder only, yet the defendant, having requested instructions on murder in the second degree and manslaughter, cannot now complain because his request was in part granted. If, under the evidence, it was error to submit the question of murder in the second degree, the defendant by his request invited such error. *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

It is next argued that the trial court erred in excluding certain testimony sought to be drawn from the defendant's wife as to what her husband told her regarding his movements on the day the crime was supposed to have been committed. This evidence, it is urged, is admissible to contradict testimony given by one of the state's witnesses to the effect that the defendant on that day, after returning to Seattle from the scene of the crime, asked him to tell the wife, if she should inquire, certain things regarding his movements which were not true. And, also, it is urged that what the defendant then told the wife was a part of the *res gestae*. The cases cited to sustain this contention seem to lay down the rule that, where an attempt is made to impeach a witness by proving former statements made by him in conflict with his testimony, his credit cannot be sustained by proof that he made, to other persons before being called as a witness, the same statements as detailed in his testimony, but such state-

ments may be admissible, if made before the effect could be foreseen, to show that his testimony is not a fabrication of recent date. *People v. Doyell*, 48 Cal. 85; *Stolp v. Blair*, 68 Ill. 541; *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050; *Hester v. Commonwealth*, 85 Pa. St. 139; *Ogden v. Peters*, 15 Barb. (N. Y.) 560. This rule does not help the defendant, as he did not offer himself as a witness, did not testify as to his movements or as to any statement he had made concerning them, and the state had no occasion to try to impeach him. The statements sought to be proven by the testimony of the wife were simply self-serving declarations and were too remote in time to be a part of the *res gestae*.

The witness Good, when he first read of the disappearance of the deceased, went to the sheriff's office and said in effect that, if the deceased disappeared on Wednesday, there was nothing in what he had to say, but if he disappeared on Friday, then he knew something which might be of assistance in unraveling the mystery, and further intimated that the knowledge which he possessed might cause those guilty to seek to put him out of the way. He then wrote the defendant's name on a slip of paper, sealed it in an envelope and gave it to the deputy sheriff, to be opened only if he, Good, disappeared or when the body of the missing man might be found, saying that, if he were killed or disappeared, the person named on the slip would be responsible. Nothing regarding the writing of the name or the leaving of the envelope was touched upon in the direct examination of the witness Good, but upon cross-examination all of the facts were brought out except only the name written upon the slip of paper, and on redirect examination the paper bearing the defendant's name was, on the state's offer, introduced in evi-

July 1920]

Opinion Per **TOLMAN, J.**

dence. The defendant argues that this was prejudicial. If so, he cannot complain. He took the chance involved in a searching examination of the state's witness, and having developed the facts of the writing of the name and the depositing of it with the sheriff and all the details surrounding it, he cannot now complain, because, under familiar and well settled rules of law, the state took advantage of what he had developed and placed before the jury that which he had made proper and material.

We have examined with care each one of appellant's numerous assignments of error, have faithfully read the record, and fail to find any prejudicial error committed by the trial court. To discuss in detail, or even to state each assignment so that the point raised can be fully understood, would unduly extend this opinion, and as each point made is easily solvable by well settled rules of law, no good purpose could be served by such statement or discussion. Appellant has twice been found guilty by a jury. The trial, which we have reviewed, was fairly conducted, appellant's rights were ably guarded by competent and eminent counsel, and he must abide the result. The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15775. Department One. July 19, 1920.]

JOHN ZINN, *Respondent*, v. HENRY KNOPES *et al.*,
Appellants.¹

HUSBAND AND WIFE (2, 2-1)—PROPERTY OF HUSBAND—LEASES—EXECUTION BY WIFE. The wife need not sign a lease of the husband's separate real estate.

FRAUDS, STATUTE OF (35)—LEASES—DESCRIPTION OF LANDS—POSSESSION. The going into possession and performance of the term of a lease is sufficient to cure an imperfect description of the premises and take the contract out of the operation of the statute of frauds.

SAME (54)—WAIVER OF BAR—PART PERFORMANCE—ESTOPPEL. An unacknowledged lease for a period of three years will be held binding for the whole term, notwithstanding the statute of frauds, under the principles of estoppel, where the lessee had performed acts called for in the contract, making it inequitable to cancel the lease and abandon increase in stock for which he had stored feed, and which could not be marketed profitably.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered November 24, 1919, upon findings in favor of the plaintiff, in an action for an injunction, tried to the court. Affirmed.

C. H. Baldwin, for appellants.

E. J. Doyle, for respondent.

MACKINTOSH, J.—Respondent and appellant Knopes, on August 12, 1918, signed a written lease for a term of three years, the lease including the farm of appellant and a large number of cattle, sheep, horses and pigs, which, under the lease, the respondent was required to feed, care for, and breed, sharing the crops of the land and the increase of the stock with the lessor. Respondent entered into possession September 1, 1918, and farmed the land, fed and cared for and

¹Reported in 191 Pac. 822.

July 1920]

Opinion Per MACKINTOSH, J.

bred the live stock and cared for the increase thereof. In the summer of 1919, more than 120 acres of the farm had been put in summer fallow for the next year's crop; the respondent had stored in the barn enough hay to care for the live stock during the succeeding winter, and the cattle, horses, sheep and hogs had been bred, and from some the increase had been foaled and born, and some were about to be foaled and born; some of the live stock had been bred for 1920 and were with foal. Respondent had hired helpers and herders, and had not yet received any benefit from the increase of the stock because the increase was not yet mature or marketable. On September 1, 1919, these things having been done, the appellant served notice under the unlawful detainer statute, demanding that the respondent vacate the land, and upon the respondent's failure to comply with the notice, an action was begun by the appellants against the respondent, seeking to obtain possession. After that action had been commenced, the present action was instituted by the respondent against the appellants asking for an injunction restraining them from proceeding further with their suit, and this appeal is from a decision favorable to respondent in the second action.

Some confusion exists in the record and the briefs in regard to the two actions, but the first action is not before this court. The action that was tried was the suit in which the respondent was plaintiff, and we are not here interested in the other action, which has not been appealed.

The appellants claim their right to the possession of the property upon three grounds; (1) that the lease in question was void for the reason that appellant Anna Knopes, the wife of Henry Knopes, did not sign the lease and that the property is community prop-

erty; (2) that the lease was void for the reason that it contained no description of the land; and (3) that the lease was void for the reason that it was unacknowledged.

First: The testimony shows that the land was the separate property of the husband Henry Knopes, and that being true, if the lease was otherwise good, the fact that the wife had not joined in the execution of it is immaterial. The husband, having the control and management of personal property, had a right to lease that without the wife joining in the execution of the lease, and the real property being his sole and separate property, it was not necessary for her signature to appear.

Second: The description contained in the lease is: "The land to be rented in this lease is what used to be the A. C. Hollenbeck ranch now owned by the first party, and is located on what is known as Montgomery Ridge, in township eight, range 46, and township eight, 47, all in Asotin county, Washington."

It may be that this description would not be sufficient in an unexecuted contract to convey the property, or in a contract between an owner and broker for real estate commission, but this was not an unexecuted contract or commission agreement. The respondent entered into possession and did those things called for by the instrument, and this is sufficient to make the question of imperfect description of no moment. The cases of *Rogers v. Lippy*, 99 Wash. 312, 169 Pac. 858, L. R. A. 1918 C 583; *Nelson v. Davis*, 102 Wash. 313, 172 Pac. 1178, relied on by appellant, are cases of incomplete description in unexecuted contracts to convey. The parties here being in possession under the instrument was sufficient to take the contract out of the statute of frauds, so far as the question of description

July 1920]

Opinion Per MACKINTOSH, J.

is concerned. *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867; *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418; *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

Third: The most troublesome question arises from the fact that the lease was unacknowledged. While it has been held that an unacknowledged lease for a term of years is, under the statute, valid for a period not exceeding one year, or where the lease provides for an indefinite term with periodical rent reserved, it shall be construed as creating a tenancy from period to period, yet, under certain circumstances, the rule has been that an unacknowledged lease for a term of years will be held to be binding for the entire term reserved, upon the principle of equitable estoppel, which prevents a party to a transaction from relying upon the invalidity, where the other party has acted in conformity with the contract and its subject-matter and has thus placed himself in a position where it would be unfair to hold the contract invalid. In other words, the party has been prevented from asserting the invalidity of a contract entered into where "it would be a fraud in a party to assert what his previous conduct had denied, when on the fact of that denial others have acted." 16 Cyc. 725. Such "a person will not be allowed to use the statute as a means to perpetrate fraud, since the chief object of the statute was to remove the temptation to commit perjury." 20 Cyc. 280. Where the consideration which has been paid by the person against whom the invalidity of the lease or contract has been urged is not a consideration which goes to the entire term provided in the writing, it has been held that there is no reason for the exercise of the rule of equitable estoppel. *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322; *Grubb v. House*, 93 Wash.

200, 160 Pac. 421; *Spreitzer v. Miller*, 98 Wash. 601, 168 Pac. 179; *Eriksen v. Manufacturers' Distributing Co.*, 103 Wash. 159, 173 Pac. 1095. But where the lessee has performed such acts as are called for in the lease or contract in the belief, and relying upon the contract, that it would be inequitable to hold the contract invalid, such leases have been sustained as though they had been executed in strict conformity with the law.

In this case the provisions of the lease themselves show that it was the intention that the respondent was to have a full term of three years in which to receive the benefit of the various things to be done by him during the first year of the term. The evidence shows that young live stock on the place, at the time the lease was sought to be terminated, was of little value; that the respondent had stored in the barns stacks of feed with which he intended to care for this increase until such time as it could be marketed profitably. To cancel the lease would be to force the respondent to abandon all the unfoaled and unborn increase, the cost of breeding which had already been paid by the respondent. Altogether, the record is such as plainly calls for the application of the doctrine of estoppel. *McGlaufflin v. Holman*, 1 Wash. 239, 24 Pac. 439; *Schulte v. Schering*, 2 Wash. 127, 26 Pac. 78. Especially does this case fall under the doctrine as announced in *Matzger v. Arcade Bldg. etc. Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915 A 288, as follows:

“That the broad principle of equitable estoppel preventing a party to a transaction from asserting its invalidity in any case where the other party, acting on the faith of the first party's attitude touching the contract and its subject-matter, has placed himself in a position where it would be inequitable to hold the contract invalid to his injury applies alike to leases as to

July 1920]

Opinion Per MACKINTOSH, J.

other contracts is clearly recognized in *Forrester v. Reliable Transfer Co.*, *supra*, where we said (59 Wash. page 95): 'This court has heretofore held that there may be such performance of acts referable to a lease contract that its terms will be enforced as though it had been executed with all the formalities prescribed by statute, the same as rights under an informally executed deed will be protected under like circumstances. . . . These cases involved both unacknowledged and oral leases. All were for terms for more than one year, and hence, did not comply with the statute in their execution, yet their provisions were given full force and effect because of the performance of acts with reference to and in the belief that they were binding contracts between the parties.' The language which we have quoted construes our own decisions not as limiting the doctrine of equitable estoppel as applied to the sustaining of contracts of lease, but as recognizing that doctrine as applicable to such contracts with like force and to the same extent as to other contracts. A careful consideration of our own decisions convinces us that what is said in some of them relative to estoppels by improvements made by the tenant beneficial to the freehold was said because that was the only estoppel claimed in the given case, not because that was the only fact which could work an estoppel in any case. In each of the cases called to our attention and chiefly relied on by the appellant where written leases have been held invalid for lack of acknowledgment, there was apparently an absence of sufficient facts invoking the principle of equitable estoppel on any ground."

The appellant in his testimony admits that the respondent, at the time the lease was entered into, stated that he would not take the land unless he could have it for three years, and to now forfeit the lease would be to deprive the respondent of the summer fallow which he had prepared, the live stock which had not yet matured, and all of the live stock of which the increase was not yet born, and would deprive him of his labor

and expense in caring for the stock, and various other items to which we have referred.

For these reasons, the judgment will be affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ.,
concur.

[No. 15815. Department One. July 20, 1920.]

AMERICAN STATE BANK, *Appellant*, v. GEORGE W. BUTTS
et al., Respondents.¹

EVIDENCE (48)—COMPETENCY—VALUE OF PROPERTY. The assessment rolls showing the assessed valuation of property are not competent evidence of the value, as between the owner and third persons.

FRAUDULENT CONVEYANCES (16)—EXEMPT PROPERTY. A conveyance of a homestead, exempt because of less value than \$2,000, is not fraudulent as to creditors.

Appeal from a judgment of the superior court for Whitman county, Truax, J., entered September 29, 1919, upon findings in favor of the defendants, dismissing an action for equitable relief, tried to the court. Affirmed.

G. E. Lovell, for appellant.

Samuel P. Weaver (S. H. Boyles, of counsel), for respondents.

MACKINTOSH, J.—The appellant recovered a judgment against George W. Butts and wife on a promissory note, dated July 1, 1917. In January, 1918, the note was overdue and payment had been demanded. On the 24th of that month, Butts transferred two hundred acres of real property, being all of the property standing in his name, to his daughter, Dollie E. Fish,

¹Reported in 191 Pac. 754.

July 1920]

Opinion Per MACKINTOSH, J.

a girl then of the age of about twenty years, and who lived at home with her parents. On March 2, 1918, judgment was taken against him on the note, execution was issued, and a return made of "no property found." Thereupon the appellant began this action to have set aside as fraudulent the transfer from Butts and wife to their daughter. The property transferred constituted the homestead of Butts and wife, the appellant saying in its brief, "we are willing to admit that this is a homestead."

The appellant's suit, then, amounts to this; that it is asking to have the homestead returned to Butts and wife for the reason that the transfer to their daughter was fraudulent, so that the lien of its judgment may attach to that residue which would remain after the deduction of the homestead exemption, the statute providing for the reaching of the excess in value of real estate claimed as a homestead over the amount exempted from execution. *Traders' National Bank v. Schorr*, 20 Wash. 1, 54 Pac. 543, 72 Am. St. 17. It is self-evident that, if the transfer to the daughter was of property which did not exceed in value the \$2,000 exemption, the question of whether the transfer was made in good faith or not is immaterial. Our first search, therefore, will be into the evidence to determine whether there was any proof establishing the value of the homestead at the time of the transfer, and if that search reveals no testimony showing that the value was in excess of \$2,000, we are not called upon to look farther into the transaction.

The testimony of the respondents and their witnesses was that the homestead, in January, 1918, did not exceed \$2,000 in value, and that that was the sum which the daughter paid. The testimony of the appellant is remarkably free from any evidence as to the value,

being confined entirely to the testimony of a deputy county assessor, who testified that the assessment rolls, presumably for the year 1918, showed that the property had been assessed for \$1,700, and that the ratio fixed by the state board of equalization for assessment was $38 \frac{7}{10}$ per cent of the real value. This was not evidence at all of the fair market value. The production of assessment rolls showing the assessed value has been held not to be any evidence of market value as between parties other than the owner and the assessing municipality. *In re Northlake Avenue*, 96 Wash. 344, 165 Pac. 113, Ann. Cas. 1917 C 341; *Savannah A. & M. R. v. Buford*, 106 Ala. 303, 17 South. 395; *Martin v. New York etc. R. Co.*, 62 Conn. 331, 25 Atl. 239; *Kener-son v. Henry*, 101 Mass. 152; *Ridley v. Seaboard & R. R. Co.*, 124 N. C. 37, 32 S. E. 379; *Anthony v. New York etc. R.*, 162 Mass. 60, 37 N. E. 780; *Pratt Consol. Coal Co. v. Morton*, 14 Ala. App. 194, 68 South. 1015; *Mayor etc. of Baltimore v. Carroll*, 128 Md. 68, 96 Atl. 1076; *Kelley v. People's etc. Bank*, 181 Ill. App. 142; *American Steel etc. Co. v. Bülter*, 200 Ill. App. 175; *Marine Coal Co. v. Pittsburgh etc. Co.*, 246 Pa. St. 478, 92 Atl. 688; *Girard Trust Co. v. City of Philadelphia*, 248 Pa. St. 179, 93 Atl. 947.

The assessing officer who had actually made an assessment might be qualified to testify as to market value, but the production of the books of the assessor's office and the testimony of some employee of that office as to their contents is not competent evidence to establish the disputed matter of this case.

There being, therefore, no evidence in the case showing that the property transferred to the respondent Dollie E. Fish was in excess of the value of \$2,000, it would be an idle and useless thing to order the property reconveyed to her parents, even if the testimony

July 1920]

Syllabus.

should be clear and convincing that the transfer to her was fraudulent.

For the reasons stated, the trial court properly found for respondent. Judgment affirmed.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ.,
CONCUR.

[No. 15464. Department Two. July 20, 1920.]

THE STATE OF WASHINGTON, *on the Relation of*
W. A. Lincoln et al., Plaintiff, v. THE SUPERIOR
COURT FOR OKANOGAN COUNTY *et al.,*
*Respondents.*¹

EMINENT DOMAIN (30)—IRRIGATION DITCHES—PROPERTY DEVOTED TO PUBLIC USE—RIGHTS OF TENANTS IN COMMON IN DITCH. Condemnation by one of the joint owners of a ditch for the purpose of carrying additional water merely adds an additional servitude entitling the co-owners to compensation, and does not deprive them of the right to the beneficial use of waters, declared by Laws of 1917, p. 448, § 4, to be a public use.

SAME (7, 21)—IRRIGATION—USE OF DITCH—RIGHT TO CONDEMN—STATUTES—CONSTRUCTION. Laws of 1917, p. 448, § 4, declaring the beneficial use of water to be a public use and granting the right to enlarge existing structures employed for public use, by necessary implication grants the right to use them when so enlarged.

SAME (39)—IRRIGATION DITCHES—FEASIBILITY OF ROUTE—EVIDENCE—SUFFICIENCY. Under Rem. Code, § 6364, preventing the condemnation of improved or occupied land for a new irrigation ditch without the owner's consent where an existing ditch will carry the water, the ditch is the only property that can be condemned for carrying additional water, where that was feasible and practicable.

APPEAL (398)—REVIEW—PLEADING—AMENDMENTS. A defect in a complaint in asking condemnation for only part of a ditch will be considered amended on appeal to make it as broad as the evidence showing a necessity for condemning the entire ditch.

CONSTITUTIONAL LAW (70, 71)—POWER OF STATE IN GENERAL—SUPERIORITY OVER PRIVATE CONTRACT. Laws of 1917, p. 448, § 4, permitting the condemnation of a ditch by one of several tenants in

¹Reported in 191 Pac. 805.

Opinion Per FULLERTON, J.

[111 Wash.

common, does not violate the obligation of the contract between the cotenants; since the eminent domain statutes are paramount and superior to contract rights.

EMINENT DOMAIN (39)—NECESSITY—EVIDENCE—SUFFICIENCY. A sufficient necessity for condemnation for irrigation is shown by evidence that a water supply will make good a deficiency for the irrigation of certain lands, and also bring under cultivation other arid and unproductive land.

Certiorari to review an order of the superior court for Okanogan county, Neal, J., entered July 22, 1919, adjudging a public use and necessity in condemnation proceedings, after a trial to the court. Affirmed.

Wm. O'Connor, for relators.

P. D. Smith and *W. C. Brown*, for respondents.

FULLERTON, J.—The petitioners and the respondent Little-Wetsel Company own abutting lands situated in Okanogan county. The lands are in an arid region and require irrigation to make them productive. The sources from which water is obtained for irrigating the lands are above the lands of the petitioners. The lands of the respondent were in part formerly owned by one Hess, and he, together with the petitioners, appropriated the waters of a creek known as Wolf creek, and constructed a ditch from the creek to their lands. The ditch for the first one thousand feet passes over what was then government land, the title to which was afterwards acquired by one Allison, and from thence it passes over the petitioners' lands to the land now owned by the respondent. Hess, on the one part, and the petitioners, on the other, owned the land and water appropriated as tenants in common in equal moieties. The respondent, at the time it acquired the land of Hess, acquired also his interest in the ditch and his interest in the appropriated waters. The ditch seems to have become known locally as, and is called in the

July 1920]

Opinion Per FULLERTON, J.

record, the Hess-Lincoln ditch. As originally constructed, and as now operated, the ditch has a capacity of some sixteen cubic feet of water per second of time.

Wolf creek, while furnishing water sufficient to supply the carrying capacity of the ditch in the early part of the irrigating season, diminishes in flow rapidly thereafter, and for the later part of the season the water from that source is insufficient to supply the needs of the parties. To augment its own supply the defendant constructed a ditch from the Methow river to the head of the Hess-Lincoln ditch, and sought to convey water from that source through its constructed ditch and through the Hess-Lincoln ditch to its lands. The petitioners objected to its doing so, and the controversy engendered thereby gave rise to the case of *Little-Wetsel Co. v. Lincoln*, 101 Wash. 435, 172 Pac. 746. We there held that the respondent had no right to so convey the water without the consent of the Lincolns, since it was to subject their interests in the ditch and their lands to an additional servitude not warranted by the agreement under which the ditch was constructed.

After the decision of this court in that case, the defendant instituted an action in the superior court of Okanogan county against the petitioners to condemn the right to carry through the Hess-Lincoln ditch the additional water mentioned. As a part of the relief sought they asked to have the ditch widened through the lands of the petitioners by taking a strip of land one foot in width from the upper side of the ditch, so as to give the ditch a carrying capacity of nineteen feet of water per second of time, instead of sixteen feet, its present capacity. At the trial of the cause, the court entered an order of necessity, and this pro-

ceeding was brought by the petitioners to review the order.

The contentions of the petitioners can be divided into two principal propositions, namely, first, that the property sought to be condemned is not subject to condemnation; and second, that, conceding it to be so subject, the evidence is insufficient to justify the order.

In support of the first of these propositions, the petitioners call attention to the declaration of the legislature to the effect that the beneficial use of water is a public use (Laws of 1917, ch. 117, p. 448, § 4), and argue therefrom that the right in the ditch sought to be condemned, since it is in aid of this use, is also devoted to a public use, and that to permit the defendant to convey through the ditch water from an independent source for its own private benefit is to take property from them and transfer it to the defendant, contrary to the rule that property devoted to a public use by one person cannot be taken from him without his consent and given to another to be devoted to a like or similar use.

But, without quarreling with the legal rule as stated, we think the premise assumed as the basis for invoking the rule has no foundation in the facts shown. The order of necessity as entered does not deprive the petitioner of any beneficial use they are making of the waters of Wolf creek, nor can we conceive that it deprives them of the means by which they make use of such waters. The ditch as at present constructed has, as we have said, a carrying capacity of sixteen cubic feet of water per second of time. The petitioners' right therein, since they are the owners of a half interest in the ditch, is to carry and to apply to their own use water up to one-half of this carrying capacity. The order of the court preserves this right in them. It but

July 1920]

Opinion Per FULLERTON, J.

gives to the respondent the right to enlarge the ditch and the right to carry therein for its own benefit such additional water as the increased capacity of the ditch will enable it to carry. This does no more than add to the ditch and to the lands of the petitioners an additional servitude for which they are entitled to compensation, but manifestly it does not deprive them of any property which they are now devoting to a beneficial use. The argument advanced in this connection, to the effect that the petitioners are seized of the whole as well as the part of the common property devoted to the beneficial use of this water and that any interference therewith is of necessity a taking of such property, is not tenable. At common law, for the purpose of tenure and the right of survivorship, joint tenants of property were said to be seized by the moiety and by the whole, but we have no such tenancies in this state. Not only is a tenure by joint tenancy against the spirit of our institutions, but it has been expressly abolished by statute, and now all common owners of property hold as tenants in common. In such a tenancy, even at the common law, the tenants hold by distinct moieties and their titles are not joint but several. Any added burden to the common property which leaves its use intact cannot, therefore, in any just sense, be said to be a taking of the property within the rule for which the petitioners contend.

A second reason urged for denying the power of condemnation is that there is no statutory authority for it. But we think there is. The section of the laws above cited provides:

“The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire property or rights now or hereafter existing when found necessary for the

storage of water for, or the application of water to, any beneficial use, including the right to enlarge existing structures employed for the public purposes mentioned. . . . Such property or rights shall be acquired in the manner provided by law for the taking of private property for public use by private corporations." Laws of 1917, p. 448, § 4.

Concerning the applicability of the statute, counsel say:

"This portion of the water code gives the right to enlarge only, and the court, I do not believe, is justified in reading something else into the statute. The rule of strict construction applies when dealing with a statute covering eminent domain proceedings, and I do not believe I need to state authorities to sustain me in this contention. This being true, that said statute should be strictly construed, the only proceeding the Little-Wetsel Company could maintain, if any at all, would be a proceeding in eminent domain for enlarging the ditch, and that is all the court could legally grant to the Little-Wetsel Company under any view of the case. To go further and entertain a proceeding to condemn the rights in a ditch already constructed and devoted to a public use for a like public use is clearly error."

But we think it clear that this is to place an unwarranted construction on the statute. The section is a part of the act known as the water code, one of the main objects of which was to provide means by which water could be impounded and carried to arid lands for irrigating purposes. To hold, therefore, that the statute is a grant of the right to enlarge existing structures constructed for such purposes, but is not a grant of the right to use them when so enlarged, would, in our opinion, be a perversion of the statute. Plainly, if the right is not expressly granted, it is granted by necessary implication.

July 1920]

Opinion Per FULLERTON, J.

Again, it is said that no order of condemnation could be entered without a showing that no feasible route exists for the construction of an independent ditch for carrying the water to the respondents' land, and that the evidence is to the contrary. The showing was that the water could be conveyed by the construction of a new ditch across the petitioners' land, but that no other feasible route existed therefor. The objection is therefore met by the statute. Section 6364 of Rem. Code provides:

"No tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch."

While the petitioners contend to the contrary, the evidence, as we view it, shows that it is both feasible and practical to unite and convey the waters as the statute contemplates. The contrary view is based on the opinion of certain of the witnesses to the effect that the excess volume of water, because of the somewhat extreme fall of the ditch, will cause the ditch to wash at one place and fill at another, and thus eventually destroy it for use. But, aside from the fact that there were opinions, seemingly of equal weight, to the contrary, it is in evidence without contradiction that the remedy for the condition assumed, should it occur, presented no engineering difficulty, but that it could, in fact, be remedied by the insertion of very simple contrivances. It being feasible and practical to convey the additional water through the ditch, the respondent has, under the statute, no choice of means for conveying

the additional water; it must convey it through the existing ditch, if it is permitted to convey it at all.

It is further contended that the order of necessity entered is erroneous because broader than the complaint upon which it is founded; the more precise contention being that the complaint asks a condemnation only of that part of the ditch extending through the petitioners' lands, whereas the order covers the entire ditch. But the objection is not fatal. Aside from the fact that we think the complaint sufficient in the respect mentioned, when the question was suggested in the court below, that court held the complaint sufficient, and the cause was tried on that theory, the evidence going to show a necessity for condemning the petitioners' interests in the entire ditch. The defect, if defect there is, is capable of being cured by amendment. In such a case we are required by statute (Rem. Code, § 1752), to "consider all amendments which could have been made as made," and must consider the complaint as broad as the evidence, even though we should find it otherwise.

The final objection on this branch of the case is that the statute permitting the enlargement of existing structures constructed for impounding and conveying water for irrigating purposes (Laws of 1917, ch. 117, § 4) is void, when applied to the particular instance, because it violates the obligation of a contract. It appears that, when the petitioners and Hess appropriated waters for irrigating their lands, they entered into a written contract by which they defined their respective rights in the water appropriated and their respective interests in the ditch by which the appropriated waters were to be conveyed to their lands, and it is argued that this contract is violated by the statute because it permits the acquisition by one of the parties

July 1920]

Opinion Per FULLERTON, J.

to the contract of greater rights in the ditch than the contract confers upon him. But we cannot conclude that this is the meaning of the constitutional inhibition invoked. Rights in property are not exempt from the statutes of eminent domain merely because they are acquired by contract, nor is common property exempt merely because the owners entered into a contract defining their interests in the property when it was acquired. Private property of one person is allowed to be taken by another for use in irrigation either because the taking is for a public use, as declared by the statute cited, or because it is a right granted by the constitution of the state. *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 Pac. 429, 140 Am. St. 893. In either event it is a right paramount and superior to any right acquired by private contract, and a taking thereunder by one of the parties to the contract cannot be said to be a violation of the provision of the constitution referred to, unless it might be so said in an instance where the contract expressly provides against the acquisition by the one party of rights not enuring to the benefit of the other party. But this question it is not necessary to decide, as it is not here presented.

The second of the principal propositions urged requires no extended discussion. To our minds, the evidence amply shows that the respondent has not, apart from the supply it here seeks to make available, sufficient water to irrigate the lands it now has under cultivation, and shows further that, by means of this supply, it can not only make good this deficiency, but can by means thereof bring under cultivation other of its arable lands which must otherwise remain arid and unproductive. There is thus a necessity for the taking of the property sought to be taken within the meaning

of that term as used in the statute, and the trial court did not err in so holding.

The order is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15713. Department Two. July 21, 1920.]

F. ZIMMERLI, *Appellant*, v. NORTHERN BANK & TRUST COMPANY *et al.*, *Defendants and Appellants*.¹

BANKS AND BANKING (7, 26)—INSOLVENCY—ASSETS—GENERAL OR SPECIAL DEPOSITS—PREFERENCES. Where both drawer and payee of a check were customers of the bank and payment of mortgage bonds sold by the bank was made by the check, the check was not a trust fund and in any event did not entitle the payee to a preferred claim on insolvency of the bank prior to the presentation of the check, since the check did not augment the funds in the bank.

FRAUD (4)—MATTERS OF FACT OR OPINION. Representations by a bank acting as selling agent of mortgage bonds that they were A-1 security, when the security in part was bad, are not admissible as fraudulent representations, being in effect mere expressions of opinion.

Cross-appeals from a judgment of the superior court for King county, Dykeman, J., entered October 11, 1919, in favor of the plaintiff as to one cause of action, and denying relief upon the second cause of action, in an action to establish preferred claims against an insolvent bank, tried to the court. Affirmed on plaintiff's appeal; reversed on defendant's appeal.

F. W. Moore and Charles H. Miller, for plaintiff.

Bausman, Oldham, Bullitt & Eggerman and *Walter L. Nossaman*, for defendants.

MOUNT, J.—The plaintiff brought this action against the Northern Bank & Trust Company (now insolvent)

¹Reported in 191 Pac. 788.

July 1920]

Opinion Per MOUNT, J.

and the state bank examiner (now commissioner) liquidating that bank, to recover a preferred claim of \$1,000, upon a first cause of action, and to recover a preferred claim for \$2,000, upon a second cause of action. The case was tried to the court without a jury, and resulted in a judgment establishing the claim upon the first cause of action as a preferred claim, and denying any relief upon the second cause of action. The defendant has appealed from that part of the judgment establishing the \$1,000 claim as a preferred claim, and the plaintiff has appealed from that part of the judgment denying any relief upon the second cause of action. We shall therefore refer to the parties as plaintiff and defendant.

The facts upon the first cause of action may be briefly stated as follows: In January of 1913, one H. Ryan and his wife executed and delivered to the Northern Bank & Trust Company four promissory notes in the form of bonds for \$500 each. These bonds were made payable to the Northern Bank & Trust Company or bearer. They were secured by a mortgage upon certain real estate. Thereafter the Northern Bank & Trust Company sold two of these bonds to the plaintiff. Afterwards the Northern Bond & Mortgage Company acquired the interest of Ryan and wife in the mortgaged property. The Northern Bond & Mortgage Company was a depositor in the Northern Bank & Trust Company. The plaintiff was also a depositor in that bank. After the Northern Bond & Mortgage Company had acquired the interest of Mr. Ryan in the real estate, that company deposited its check with the Northern Bank & Trust Company in satisfaction of the mortgage which had been executed by Ryan and wife. The officers of the bank thereupon satisfied the mortgage. The plaintiff was not notified

that the bonds had been paid and the mortgage released. The check drawn in payment of the bonds was drawn upon funds on deposit in the Northern Bank & Trust Company. Thereafter, and before the plaintiff was notified that the bonds had been paid, the bank examiner (now commissioner) took charge of the bank as an insolvent institution and proceeded to its liquidation. The plaintiff seeks upon these facts to have his claim for \$1,000 declared a preferred claim, upon the theory that the check for the payment of his bonds was a trust fund to be paid to him, and because it was not paid to him, that he is entitled to a preferred claim for that amount. It is stipulated that the bank commissioner has on hand more than \$1,000 of the bank's assets. The trial court was evidently of the opinion that the check deposited in payment of the bonds was a trust fund, and for that reason ordered that the plaintiff have a preference right to his money.

The counsel for the defendant make the contention here that, because the assets of the bank were not augmented by the transaction, there could be no preference right on the part of the plaintiff, and cite a number of cases to that effect. The rule seems to be, as stated in 14 R. C. L. at page 664:

"But where a trustee has mingled the trust funds with his individual money, the *cestui que trust* is not generally allowed to follow and hold it as against the creditors of the trustee, unless he can trace it and show that the estate has been increased by the misappropriation."

In the case of *Empire State Surety Co. v. Carroll County*, 194 Fed. 593, it was said:

"It is indispensable to the maintenance by a *cestui que trust* of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust prop-

July 1920]

Opinion Per MOUNT, J.

erty or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver."

On page 606 the court said:

"Proof that these checks augmented the cash that went into the hands of the receiver, or that they produced cash which he obtained, was indispensable to any preference on their account.

"But checks of third persons on the bank with which they are deposited which are paid by crediting the bank and charging the drawers on its books fail to increase the cash in its possession and form no basis for a preferential payment to the depositor. *Beard v. Independent District of Pella City*, 88 Fed. 375, 382, 31 C. C. A. 562.

"Moreover, the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no foundation for preferential payment to the depositor. *City Bank v. Blackmore*, 75 Fed. 771, 773, 21 C. C. A. 514."

In *Beard v. Independent District of Pella City*, 88 Fed. 375, it was said:

"The foundation of the right on part of the owner of a trust fund to a preference over general creditors in payment out of a fund or estate that has passed to the assignee or receiver of an insolvent person or corporation is, that the trust fund has been wrongfully confused or intermingled with the property of the insolvent, or has been used to increase the value of property, thereby increasing the amount or value of the funds or estate passing into possession of the assignee or receiver; that, if this intermingling had not taken place, the fund passing to the receiver would

have been so much less; that the creditors have only the right to subject the property of the debtor to the payment of their claims, and therefore the creditors cannot complain if the total fund coming into the hands of the receiver is reduced by the amount necessary to make good to the owner of the trust fund the sum which was wrongfully used in augmenting the fund or property passing to the receiver. Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors, and this we understand to be the doctrine recognized by the supreme court of Iowa and the supreme court of the United States alike."

The evidence in this case fails to show that there was any augmentation of the funds of the bank by the payment of the bonds in this case. The payment was made by a check drawn upon funds already in the bank. Both the drawer and the payee of the check were customers at the bank. The utmost duty of the officers of the bank on receiving the check in satisfaction of the bonds and mortgage was to pass the amount of the check to the credit of the plaintiff. This was not done. If it had been done the plaintiff would have been a general creditor and nothing more. The fact that it was not done did not place him in any better position than if the officers of the bank had done their duty and placed the amount of the check to his credit.

The defendant relies upon the case of *Carlson v. Kies*, 75 Wash. 171, 134 Pac. 808, 47 L. R. A. (N. S.) 317. That was a case where there was a special deposit of \$3,070 in the bank to be held for a stated purpose. The deposit in that case clearly augmented the assets of the bank. The point made here was not in that case. Counsel also cite the case of *State ex rel. Titlow v. Centralia*, 93 Wash. 401, 161 Pac. 74. That

July 1920]

Opinion Per MOUNT, J.

was also a case where the funds were augmented by the receipt of money. The case of *Rugger v. Hammond*, 95 Wash. 85, 163 Pac. 408, is also cited by the defendant. That was a case where certain rugs had been entrusted to the insolvent corporation to be sold. Part of the rugs were sold and the money received therefor was mingled with the assets of the insolvent corporation. It was held in that case that there was no preferential right of the creditor. In none of these cases was the point now under consideration discussed.

We think it is clear that there could be no preferential claim of the plaintiff upon the funds of the insolvent bank, even if the deposit of the check by or on behalf of the maker of the bonds might be held to be a trust deposit, because the deposit of this check did not increase or augment the funds of the bank, and we see no good reason for giving the plaintiff a preference over general creditors. Furthermore, we are of the opinion that, if the officers of the bank had performed their whole duty, they would have deposited the check to the credit of the plaintiff when the check was received, and if they had done their duty in this respect the plaintiff would have been merely a general creditor of the bank and entitled to no preference right. The mere fact that the bank officers did not do their duty gave him no greater rights than he would have had if they had performed their duty fully. We are of the opinion, therefore, that the trial court erred in establishing this claim as a preference claim over general creditors.

The second cause of action, upon which the plaintiff has appealed, was one where one Hunter, who was at that time an officer of the bank, executed certain bonds and secured them by mortgage upon real estate. Four of these bonds were purchased by the plaintiff. The

bonds have not been paid. Plaintiff is seeking to hold the bank therefor. It is claimed that the officers of the bank represented to the plaintiff, at the time they purchased these bonds, that they were A-1, secured by a mortgage double the value of the bonds, without any other liens thereon. The evidence of the plaintiff upon this question was to the effect that he asked the manager of the bank, at the time he bought the bonds, as to the value thereof and as to the security, and was informed that the bonds and security were A-1. There was evidence to the effect that, at that time, the security was in fact good. There was evidence also that there were improvement liens against the property, which is not now worth the amount of the bonds. The trial court, after hearing the evidence on this question, evidently concluded that there was no fraudulent representation, that the expressions made by the bank officers at the time plaintiff purchased these bonds were in effect expressions of opinion merely. The bank did not indorse the bonds. They were simply agents for the purpose of collecting the interest and principal and paying it to the bondholders.

We are satisfied from the record here that the trial court properly found upon this cause of action, and the judgment of the trial court thereupon is affirmed.

The defendant, being successful in this court, is entitled to costs.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

July 1920]

Opinion Per MOUNT, J.

[No. 15889. Department Two. July 21, 1920.]

M. C. MILLER, *Respondent*, v. JOSEPH SCHOBBER *et al.*,
Appellants.¹

MECHANICS' LIENS (40-1)—NOTICE TO OWNER—NECESSITY. Notice to the owner of the delivery of material, as required by Rem. Code, § 1133, is not necessary where the material was furnished to a contractor on the owner's order, and upon the contractor's failure to pay, the owner ordered the delivery to continue.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered August 25, 1919, upon findings in favor of the plaintiff, in an action to foreclose a mechanics' lien, tried to the court. Affirmed.

Ralph Kauffman, for appellants.

G. P. Short and *C. R. Hovey*, for respondent.

MOUNT, J.—This action was brought to foreclose a lien for lumber furnished by the plaintiff and used in the construction of a building for the defendants Schober and wife. On the trial of the case to the court without a jury, judgment was rendered in favor of the plaintiff for the amount of his claim. The defendants have appealed.

There is no dispute as to the amount of the material furnished nor its value, nor as to the balance due on account thereof. The sole question is whether Mr. Schober's property is liable for the amount of the claim. It appears that, in June of 1918, Mr. Schober entered into an agreement with one Hutter for the construction of this particular building, and also another building. Mr. Hutter constructed the building, obtaining the lumber from the respondent. Before the

¹Reported in 191 Pac. 800.

building was finally completed, he became embarrassed and was unable to pay the balance due for the lumber. The respondent filed a claim for lien.

It is conceded that no notice was served upon the appellant as provided for in § 1133 of Remington's Code. The appellant insists here that the trial court erred in sustaining the lien because this notice was not served. The respondent maintained in the lower court, and maintains here, that there was no obligation to serve the notice provided for in that section, because the lumber was ordered by the appellant himself, and therefore it was not necessary for the notice to be given him. This court has held in several cases that, "when the materialman furnishes material to the owner, either directly or through an agent of the owner, the statute in question has no application." *Spokane Valley Lumber & Box Co. v. Dawson*, 94 Wash. 246, 161 Pac. 1191, and cases there cited. Upon this question the trial court found as follows: That the appellant, with Mr. Hutter, went to the respondent, and Mr. Schober

"thereupon solicited plaintiff . . . to supply him, the said defendant, with the building materials which he would need in the construction of two buildings which he was about to erect in the city of Cle Elum, and of the construction of which buildings the said Frank Hutter was to have charge; and the said Schober thereupon informed the said plaintiff that the said Hutter would inform him of the details as to what would be needed."

The trial court also found that, after Mr. Hutter became insolvent and had notified the respondent that he would not be able to pay for any more lumber, the respondent notified Mr. Schober of that fact

"and asked him what his wishes were in the matter, and Schober instructed plaintiff to go ahead and con-

July 1920]

Opinion Per MOUNT, J.

tinue the supplying of materials, as the building had to be completed, and that practically all of the materials which had not been paid for were supplied on and after said time."

These findings were made upon disputed testimony, but we have read the statement of facts carefully and conclude therefrom that the findings are amply justified by the testimony. In fact, we are of the opinion that the weight of the evidence is in favor of these findings. This being true, it follows that, under the rule above stated, it was not necessary for the respondent to give notice to the owner of the building as required by § 1133, Rem. Code, because, under these facts, the material was furnished upon the order of the appellant. He knew that the respondent was furnishing the lumber, and not only that, when he was informed that Mr. Hutter could not pay for more, he told the respondent to go ahead and continue furnishing materials, and that, after that time, all the materials which had not been paid for were supplied.

The judgment appealed from must therefore be affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15842. Department Two. July 21, 1920.]

H. N. MARTIN, *Appellant*, v. C. C. BATEMAN *et al.*,
Respondents.¹

FRAUDS, STATUTE OF (9)—AGREEMENTS RELATING TO REAL PROPERTY. An oral contract to convey an interest in real estate to an attorney in consideration of services is within the statute of frauds and void.

SPECIFIC PERFORMANCE (6) — DEFENSES — TITLE OF DEFENDANT. Where, at the time of commencing suit for specific performance, the title had been conveyed and plaintiff knew that the court was without jurisdiction to decree specific performance, it is error to grant alternative judgment for damages.

PLEADING (112)—COMPLAINT—AMENDMENT — NEW OR DIFFERENT CAUSE OF ACTION. It is not an abuse of discretion to refuse to allow a trial amendment to the complaint where it introduced new issues and amounted to an abandonment of the stated cause and the commencement of an entirely new action.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered December 19, 1919, upon granting a nonsuit, dismissing an action for equitable relief, tried to the court. Affirmed.

M. E. Jesseph and *W. A. Wilson*, for appellant.

Fred B. Morrill and *F. H. McDermont*, for respondents.

PER CURIAM.—The appellant Martin sued the respondents Bateman and wife in the superior court of Lincoln county, seeking a decree of the court decreeing him to be the owner of a half interest in some four hundred and eighty acres of land situated in the county named, and requiring the respondents to convey such interest to him. In his complaint he alleged that the respondent C. C. Bateman was formerly the owner of the land mentioned; that he had, while such owner,

¹Reported in 191 Pac. 759.

July 1920]

Opinion Per Curiam.

executed three separate mortgages covering the land, aggregating approximately twenty thousand dollars; that one of such mortgages had been foreclosed and the land sold thereunder and a sheriff's deed issued; that another had been foreclosed, the land sold thereunder, and the time for redemption had about expired, and that an action was pending to foreclose the third; that, with these conditions existing, the respondent C. C. Bateman employed him as an attorney at law to appear for the respondents and effect for them a right of redemption from such foreclosure sales, agreeing to give him "a one-half interest in and to said described real estate in consideration for such services"; that he entered upon such service, and procured for the respondents the right to redeem from such sales on the payment of seventeen thousand dollars, and otherwise performed all of the conditions of his contract; that the respondents thereupon refused to convey to him a one-half interest in the property, and that he had been in no manner remunerated for his services. The prayer was for the relief first stated, and for such other and further relief as the court should deem meet and equitable.

The answer admitted the employment of the appellant as an attorney at law to perform legal services in the cases mentioned, but denied the contract alleged, and further alleged a payment in full for the services performed.

On the trial of the cause, it developed from the appellant's testimony that the agreement upon which he relied was oral, and that the respondents had parted with their title to the land prior to the commencement of the action, a fact known to the appellant, whereupon the court held that there could be no recovery either in specific performance or in damages. The appellant

thereupon, through his counsel, asked leave to amend his complaint "so as to allege that the profits to be derived were to be divided instead of the land; that it was a partnership agreement between Mr. Bateman and Mr. Martin with reference to these profits, if any." No amended complaint was tendered, and the court, on the objection of the other side, refused to allow the amendment, but did allow the appellant to introduce such evidence as he desired tending to support the cause of action the proposed amendment suggested. At the conclusion of the appellant's case, the court sustained a challenge to the sufficiency of the evidence, and entered a judgment dismissing the action, with costs against the appellant. From this judgment, Martin appeals, assigning as error, first, the entry of the judgment against him; and second, the refusal of the court to allow a trial amendment to the complaint.

On the complaint in the record, clearly there could be no recovery. In the first place, the contract was one to convey an interest in real property, and, being oral, was within the statute of frauds. In the second place, it was known to the appellant, at the time of commencing his suit, that the respondents had parted with their interests in the property, and that specific performance could not be had even were the suit otherwise maintainable. The court was thus without jurisdiction to decree a specific performance, and this being known to the appellant at the time of the commencement of the suit, it would have been error to render an alternative judgment for damages. *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; *Peters v. Van Horn*, 37 Wash. 550, 79 Pac. 1110; *Wright v. Suydam*, 59 Wash. 530, 108 Pac. 610, 110 Pac. 8; *Smith v. Flathead River Coal Co.*, 64 Wash. 642, 117 Pac. 475.

July 1920]

Opinion Per Curiam.

Nor are we able to conclude that the court abused its discretion in refusing to allow a trial amendment to the complaint. While the statement of the appellant's counsel as to the nature of the change desired is somewhat meager, enough is detailed, when considered in the light of the subsequent evidence introduced, to show that the proposed change would have introduced issues radically different from the issues made by the original complaint; issues, also, which the respondents were entitled to have definitely stated, issues which they were entitled to have time to prepare to meet, and issues on which they were possibly entitled to a trial by jury. In fine, the proposition was to abandon the stated cause of action and to commence an entirely new action. Since the judgment entered is not a bar to the new action, it would be too much to say, we think, that the court erred in a ruling the effect of which is only to require the appellant to commence the action in the regular way.

The judgment is affirmed.

[No. 15786. Department Two. July 21, 1920.]

J. J. HAGGERTY *et al.*, *Appellants*, v. BUILDING
INVESTMENT COMPANY, *Defendant*, AMERICAN
SAVINGS BANK & TRUST COMPANY,
Appellant, and W. H. BOGLE
et al., *Respondents*.¹

MORTGAGES (67)—ABSOLUTE DEED AS MORTGAGE—RECORDING—RECORD AS NOTICE—REQUISITES—STATUTES. Under the recording statutes, treating deeds and mortgages alike and requiring them to be indexed in the same general index, the record of a deed, absolute in form but intended as a mortgage, is notice to the world when recorded and indexed as its form suggests and the statute requires.

SAME (102)—TRANSFER OF PROPERTY—ASSUMPTION OF MORTGAGE DEBT. A mortgagee by deed absolute in form, who gave a warranty deed to a purchaser and assumed a liability for liens not imposed by law or contract, which he was obliged to pay by reason of the warranty, cannot pass the burden to those in possession under claim of title who are in a position to demand that their obligation be limited to the strict terms of the mortgage.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 13, 1919, dismissing an action to foreclose a mortgage, tried to the court. Reversed.

H. A. P. Myers, for appellants.

Bogle, Merritt & Bogle, for respondents.

TOLMAN, J.—The facts in this case are not seriously in dispute and may be stated chronologically as follows: On May 27, 1902, the defendant Building Investment Company purchased from the Moore Investment Company, lots 21 and 22, in block 17 of Capital Hill addition No. 2, in the city of Seattle, and on the same day agreed with respondents to sell them the lots so purchased and to erect thereon a residence

¹Reported in 191 Pac. 760.

July 1920]

Opinion Per TOLMAN, J.

according to certain agreed plans and specifications. The price of the lots being fixed, and respondents to pay in addition thereto the cost of the house to be erected, plus supervisory expenses agreed upon, the respondents then paid \$1,000 on account of such purchase, and took a receipt in which was set forth the substance of the agreement, but the formal contract covering the transaction was not executed until June 30 following. In the initial agreement it was provided that the Building Investment Company should negotiate a building loan of \$3,000 to be secured by a mortgage on the property, and it obtained such loan from appellant American Savings Bank & Trust Company. The mortgage given to secure this loan being placed of record on May 30, 1902, the respondents afterwards, by the deed which they received from the Building Investment Company, assumed this mortgage and have since paid it. On June 10, 1902, appellant J. J. Haggerty, acting for and on behalf of appellant American Savings Bank & Trust Company, took from the Building Investment Company a deed, absolute in form, to the lots in question (and other property), but intended as a mortgage to secure \$2,400 then advanced by the American Savings Bank & Trust Company to the Building Investment Company, and to secure such future advances as the bank might make to the building company. This deed was filed for record on June 10, 1902, and afterwards recorded in a book of deeds, and indexed as a deed. Respondents, without any actual knowledge of the execution, delivery and recording of this deed, completed their payments to the Building Investment Company, and on August 2, 1902, received a deed from the Building Investment Company in accordance with the terms of their contract, which deed was filed for record November 15, 1902,

and was the first record notice of respondents' interest in the land. The residence was completed and respondents went into possession about October 1, 1902, and have since occupied the property as their home.

This action was brought to foreclose as a mortgage the deed given by the Building Investment Company to Haggerty, the complaint alleging the facts relating to the loan and the execution and delivery of the deed to secure it; that it was agreed that the property described in the deed, other than the lots now in question, should be released upon the payment of \$200 for each lot, and that all other lots had been so released. The complaint further alleges that, by reason of litigation involving some of the lots, a lien was established thereon which the appellants were compelled to and did pay, and prays for a judgment for the amount unpaid on the original deed, plus the advances, and for the foreclosure of the deed as a mortgage. The answer, after certain denials, alleges that the respondents purchased the property in good faith, without notice or knowledge of any claim on the part of appellants; that, if the bank made any advances to the building company, they were made with knowledge of respondents' rights; that, if advances were made to discharge a lien upon the other lots, such advances were made because appellants were liable under a warranty deed made by them conveying such property, and not otherwise, and further alleges that, prior to the commencement of the action, appellants had received sufficient from the sale of other lands covered by the deed to pay in full any claims they may have had.

The cause was tried to the court, and after hearing the evidence upon both sides, the trial court dismissed the action upon the ground that the deed in question was not constructive notice to respondents, because it

July 1920]

Opinion Per TOLMAN, J.

was not recorded as a mortgage in a book of mortgages.

An examination of the authorities at once reveals that, in passing upon the question which is here presented, the courts of the several states have been largely influenced by the statutes in force at the time and place where the question arose. Our recording statute, Rem. Code, § 8781, provides:

“All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against *bona fide* purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world.”

Section 8784 provides that irregularly executed instruments, when recorded, shall impart notice to third persons from the date of recording to the same effect as though properly executed. Section 8785 directs that, for the purpose of recording deeds and other instruments, the county auditor shall procure such books as the business of his office requires. Section 8786 is as follows:

“He must, upon the payment of his fees for the same, record separately in large well-bound books in a plain hand,—

“(1) Deeds, grants and transfers of real property, mortgages and releases of mortgages of real estate, powers of attorney to convey real estate, and leases which have been acknowledged or proved;

“(2) Marriage contracts;

“(3) Official bonds;

“(4) Instruments describing or relating to separate property or community interest of married women;

“(5) Patents to lands and receiver's receipts, whether for mineral, timber, homestead or pre-emption claims or cash entries;

“(6) Certificates of sales for county or municipal taxes:

“(7) All such other papers or writings as are required by law to be recorded and such as are required by law to be filed if requested so to do by the party filing the same.”

And § 8787, so far as it affects the present question, reads:

“Every auditor must keep a general index, direct and inverted. The direct index shall be divided into seven columns, and with heads to the respective columns, as follows: Time of reception, grantor, grantee, nature of instrument, volume and page where recorded, remarks, description of property. He shall correctly enter in such index every instrument concerning or affecting real estate which by law is required to be recorded, the names of grantors being in alphabetical order. The inverted index shall also be divided into seven columns, precisely similar, except that the ‘grantee’ shall occupy the second column and ‘grantor’ the third, the names of grantees being in alphabetical order. For the purpose of this act, the term ‘grantor’ shall be construed to mean the person conveying or encumbering the title to any property, or any person against whom any *lis pendens*, judgment, notice of lien, order of sale, execution, writ of attachment, or claims of separate or community property shall be placed on record.”

It will at once be seen that the statute makes no distinction between deeds and mortgages, and so far as recordable instruments are by statute classified, deeds and mortgages are placed in the same class. It is true that § 8785 authorizes the auditor to procure such books for records as the business of his office requires, and we know that it has been the custom to procure and keep mortgage records distinct from the records of deeds. But while recorded in distinct and separate books for convenience and not by any statutory re-

July 1920]

Opinion Per TOLMAN, J.

quirement, all are alike entered in the same general index which is required to be kept by § 8787, and since every searcher gains the information from the general index which leads him to the instrument desired, we think all must take notice of what the general index reveals, and none may be heard to say that, because the auditor may, for his own convenience or that of the public, record some of the instruments there indexed on one book and some in another, he may shut his eyes to what the index, speaking as the statute directs, tells him. It is true that in *Bernard v. Benson*, 58 Wash. 191, 108 Pac. 439, 137 Am. St. 1051, the broad statement was made:

“The custom has been uniform throughout the state to record all instruments affecting the title to real estate in Deed Records, those creating an incumbrance against real estate in Mortgage Records, and those evidencing title to personal property in Miscellaneous Records. This custom has been so general and has existed for so long a period of time that it is our duty, not only to judicially notice it, but to apply it as well.”

As will be seen from the language quoted, the court there assumed that it was dealing with an instrument affecting the title to real property which had been recorded as though it related to personalty only, and so far as what is said appears to separate and distinguish deed records from mortgage records, it was *obiter* only, no doubt inadvertent, and should be disregarded. When so read, the holding there is in harmony with the rule long followed by this court. *Dunsmuir v. Port Angeles Gas etc. Co.*, 24 Wash. 104, 63 Pac. 1095; *Bonneviere v. Cole*, 90 Wash. 526, 156 Pac. 527. Since the plain language of the statute treats deeds and mortgages alike, classifies them together, and specifically directs that all instruments affecting real property shall be indexed in the same general

index, we find no difficulty in holding with the great weight of authority that a deed, absolute in form but intended as a mortgage, is notice to all the world of any and all rights which may be claimed thereunder, when recorded and indexed as its form suggests and the statute requires. 23 R. C. L. 188; L. R. A. 1916 B 600; *Kent v. Williams*, 146 Cal. 3, 79 Pac. 527; *Security Savings & Trust Co. v. Loewenberg*, 38 Ore. 159, 62 Pac. 647; *Livesey v. Brown*, 35 Neb. 111, 53 N. W. 838; *Marston v. Williams*, 45 Minn. 116, 47 N. W. 644; *Ruggles v. Williams*, 38 Tenn. (1 Head) 80; *Clemons v. Elder*, 9 Ia. 272; *Equitable Building & Loan Ass'n v. King*, 48 Fla. 252, 37 South. 181; *Kennard v. Mabry*, 78 Tex. 151, 14 S. W. 272. Other authorities are collated and discussed in an exhaustive note found in 8 Am. & Eng. Ann. Cas. 104.

Our views upon the main issue, as have been expressed, make it necessary to consider the defenses specially pleaded, and as we are without the assistance of any findings thereon by the trial court, we have carefully examined the record for the facts. It is not seriously claimed that the bank, when it made the original loan, had any actual knowledge of respondent's rights, and we think that defense is not established.

The second defense, that the subsequent advances were made not as a loan to the building company, but in satisfaction of a liability established by judgment against Haggerty, is more serious. In the action establishing that liability, Haggerty and wife were the only defendants, and the court found that they (though, as claimed both here and there, they were mortgagees only), gave to the purchaser a warranty deed; that the property was then subject to certain lienable claims which the purchaser was obliged to and did pay, and gave judgments against the Haggertys for the amount

July 1920]

Opinion Per TOLMAN, J.

thereof, which judgment was paid, not voluntarily as an advance under the mortgage, but involuntarily because of the liability flowing from the execution and delivery of the warranty deed. We find nothing in the record which in any wise convinces us that it was the duty of Haggerty, under the terms of the mortgage, to give the purchaser a warranty deed, and though the mortgage was in the form of an absolute deed, the law imposes no such duty. Having assumed a liability which neither the contract nor the law imposes, whatever the liability of the mortgagor may be, we think it inequitable that he should be permitted to pass the burden thereof to respondents, who were then in possession under a claim of title, and in a position to demand that their obligation be limited to the strict terms of appellant's mortgage.

We see nothing inequitable in the agreement, which the evidence seems to establish, that the lots mortgaged, other than the ones in question here, should be released upon the payment of \$200 each, as they were of little value and subject to prior mortgages. Respondents are entitled to have credited upon the original loan \$200 for each lot which was actually released and not lost by the foreclosure of a prior mortgage, and for any sum then remaining unpaid upon the original loan of \$2,400. Appellants are entitled to a judgment and the usual decree of foreclosure.

Reversed, and remanded for further proceedings in accordance with the views herein expressed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15877. Department Two. July 21, 1920.]

FREDERICK N. BULGER, *by his Guardian ad Litem*
F. W. Bulger, Respondent, v. OLATAKA YAMAOKA,
Appellant.¹

MUNICIPAL CORPORATIONS (389)—STREETS—AUTOMOBILES—NEGLECT USE—EVIDENCE—SUFFICIENCY. Whether the driver of an automobile could have seen a child in time to avoid striking him, is a question for the jury where there was evidence that he was driving slowly, the view across a parking strip was unobstructed, the child passing over a space of seventeen and one-half feet before entering the paved highway, which was twenty-five feet from curb to curb.

SAME (392)—AUTOMOBILES—DEGREE OF CARE—DUTY OF DRIVER AT ALLEY INTERSECTIONS. In an action for personal injuries in striking a child emerging from an alley intersection in a residential section where children were playing on the street, it is not error to refuse instructions limiting the care to be exercised by automobile drivers to street intersections.

SAME (392)—INSTRUCTIONS. In an action for personal injuries to a child four years of age, struck by an automobile, an instruction as to the due care to be exercised if the driver saw the child approaching, need not include the restriction, "if he appreciated the danger of the situation," where it was apparent that the child was unaware of the automobile's approach.

Appeal from a judgment of the superior court for King county, Samuel H. Steele, judge *pro tempore*, entered September 19, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor struck by an automobile. Affirmed.

Shank, Belt & Fairbrook, for appellant.

Tucker & Hyland, for respondent.

TOLMAN, J.—The respondent, by his guardian *ad litem*, brought this action to recover for personal injuries occasioned by an automobile operated by appel-

¹Reported in 191 Pac. 786.

July 1920]

Opinion Per TOLMAN, J.

lant's minor son coming into collision with respondent while he was riding upon a roller or skate coaster. The cause was tried to a jury, which rendered a verdict for \$500 in respondent's favor, and this appeal is from a judgment upon the verdict.

So far as necessary for an understanding of the points raised here, the facts may be briefly stated as follows: At the time in question, appellant's automobile, a Stutz right-hand drive, was being operated by his fifteen-year-old son on Highland Drive, a street in one of the residence sections of the city of Seattle. The car was proceeding westerly along the right-hand side of the street, and as it approached the intersecting alley between Seventeenth and Eighteenth avenues, some children were observed to be playing upon the street. Whether or not the driver sounded his horn is one of the disputed facts in the case, but it is admitted that the car slowed down, and the children moved to the left and out of its pathway, and thereupon the driver increased the speed of the car, which speed was variously estimated at the instant of the collision to have been from twelve to twenty miles per hour. Respondent, a child of four years of age, upon his coaster, which was impelled by pushing with his left foot upon the ground, emerged from the alley on the south side of the street at about the time the children in the street stepped aside, and proceeded across the street on such a course as to bring him into collision with the automobile.

In order to establish negligence upon the part of the driver of the automobile, the jury had to find that, in the exercise of ordinary care, he could or should have seen the respondent in time to avoid the collision. We have carefully examined the evidence upon this point and are thoroughly satisfied that there was

abundant evidence in the case from which the jury could so find. While it is true that there was a garage at the corner of the alley, built out to the property line, thus preventing any extended view up the alley until the driver approached very closely to the alley line projected, and there was a telephone pole at each side of the alley in line with the parking strip, and there were children playing in the street; yet it is also shown that there was an inner parking strip three feet wide, the width of the sidewalk, six feet, and an outer parking strip of eight and one-half feet, or the space of seventeen and one-half feet over which respondent passed after emerging from the alley and before entering the paved driveway, which was twenty-five feet wide from curb to curb, and the jury might well have found from the evidence that the children were not in a position to obstruct the driver's view; that the telephone pole could not obscure respondent for a single instant, and that, had he exercised ordinary care, the driver must have seen the respondent in ample time to have avoided the accident.

This view of the evidence disposes of all of the assignments of error based on the supposition that the case should not have been submitted to the jury. The remaining assignments are based upon the instructions given and refused.

Appellant complains because the trial court did not instruct that the driver is not bound to use the same degree of care in looking out for pedestrians at alley intersections as he is at street intersections, and while no direct authority to that effect is produced, it is argued that, while an alley is in a sense a public thoroughfare, yet it is intended as a convenience to the occupiers of abutting property, and that the crossing of a street at an alley intersection by a pedestrian is

July 1920]

Opinion Per TOLMAN, J.

comparatively rare. We do not find it necessary, under the facts in this case, to lay down any rule on this subject. This automobile was being driven through a residential section of the city where children were admittedly playing on the street, and whether respondent came from the alley, the sidewalk, or some portion of the street, is important only as evidencing the opportunity the driver had to see him in time to avoid the collision. It is not contended that a driver, under the conditions here shown, may, between street intersections, limit his view to the roadway immediately in front of him, relying upon his having the right of way, solely, and stop only when someone appears directly in his pathway. Since such is not the rule, the several instructions asked for upon this subject would have been of no assistance to the jury, and might have been confusing.

An instruction was given to the following effect: If you find from the evidence that the driver, before the collision, saw, or, acting as a reasonably prudent person, should have seen, the plaintiff approaching and crossing the street, and if you further find that the driver, after observing the plaintiff approaching, or after he should have seen him so approaching, in the exercise of ordinary care should have slowed down, turned aside, or stopped, and thereby avoided the collision, and that the plaintiff was injured by reason of the driver's failure so to do, then and in that case you should find for the plaintiff. Complaint is made that there should have been included in this instruction words to the effect that, when the driver saw, he appreciated the danger of the situation. That might be a proper element to include in some situations, but we think here, if the driver saw a four-year-old child impelling a coaster swiftly towards an oncoming auto-

mobile, apparently unaware of its approach, he would be guilty of a want of ordinary care if he did not appreciate the danger, hence the instruction was proper as given.

We have examined the instructions given, and are satisfied that they clearly and fairly gave to the jury the law applicable. The judgment is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15711. Department One. July 22, 1920.]

FRANK NOEL *et al.*, *Respondents*, v. GARFORD MOTOR TRUCK COMPANY *et al.*, *Appellants*.

FRANK NOEL *et al.*, *Respondents*, v. GARFORD MOTOR TRUCK COMPANY, *Appellant*.¹

SALES (58)—WARRANTY—RESCISSION BY PURCHASER—WAIVER OF RIGHT. There is no waiver of the right to rescind for breach of warranty on the sale of a motor truck from the fact that the purchaser retained and used the truck for six or seven weeks after discovering the defects, where the delay in rescission was induced by repeated assurances of the vendor that it would be made to work properly, and efforts on the part of mechanics sent by the vendor to remedy the defects were without success.

SAME (59)—BREACH OF WARRANTY—RESCISSION—PLACING IN STATU QUO. The purchaser of a motor truck may rescind the sale for breach of warranty, although the truck suffered damage through a collision while in his possession, the evidence showing that the truck was in substantially the same condition after its repair as prior to the accident and that the collision was caused by a stalling of the truck due to a defective motor, and that the driver was free from negligence.

Appeal from a judgment of the superior court for King county, James B. Murphy, judge *pro tempore*, entered August 8, 1919, in favor of the plaintiffs, in

¹Reported in 191 Pac. 828.

July 1920]

Opinion Per MAIN, J.

consolidated actions for rescission and to foreclose a chattel lien, tried to the court. Affirmed.

Kerr & McCord (Wm. Z. Kerr, of counsel), for appellants.

Ryan & Desmond, for respondents.

MAIN, J.—The two above entitled cases were consolidated in the superior court and tried as one action. The subject-matter of the litigation was a motor truck. In one of the cases, the plaintiffs were seeking to rescind the contract of purchase and recover their money back. In the other, the seller was attempting to foreclose a lien for labor performed upon the truck. The trial court sustained the right of rescission and entered a judgment accordingly. From this judgment, the Garford Motor Truck Company appeals. The controlling facts are not in material dispute.

On May 26, 1918, Fred Noel, one of the respondents, then residing at Yakima, came to Seattle and contracted for the purchase of a Garford motor truck. The truck purchased was at the time en route from the factory to Seattle. It arrived shortly before June 19, and was taken to the shop of the Commercial Garage to have a certain type of body placed on the chassis. On June 19, Fred Noel came again to Seattle, went to the Commercial Garage, received the truck and drove it to the Garford Company's place of business, some blocks distant in the same city. During this trip up town, there were several grades, and the motor, when it arrived at the Garford place, was heated to such extent that it stalled. The workmen of the Garford company spent most of the afternoon checking up the motor, and Noel left late in the afternoon to drive the truck to Yakima. He was unwilling, owing to the fact that the motor had heated upon its first trip through

the city, to make the trip to Yakima without assistance, and an employee of the Garford company, a mechanic, accompanied him. The truck was run all that night and arrived at Yakima late the following afternoon. During the night, it heated continuously; about every two hours the driver was forced to stop and let it cool off. Shortly after the truck arrived at Yakima, it was driven a short distance on the road to tow in a broken-down car, and during this drive the motor heated and missed. The following morning the truck was taken to Sunnyside, and during this trip it also heated. After reaching Sunnyside, it was put immediately to work hauling gravel, but could only make a few trips a day, while other trucks of the same make would make ten or twelve. The Garford company was notified, and in a few days sent a mechanic from Seattle to put the truck in proper condition. After this the truck continued to heat when used, as before, and required frequent stops in order to cool it off. At different times subsequent, other mechanics, upon complaint of the purchaser being made, were sent to look after the truck. It was operated at Sunnyside for a period of six or seven weeks, when it was taken to Seattle. During the period that it was operated at Sunnyside, it burned out four sets of wires, four sets of connecting rods, and a number of valves. When the car arrived at Seattle, it was taken to the Garford company's garage and W. H. Krause, the sales agent who had sold the car, expressed his pleasure at the truck's being brought there, and said:

"We will see if we can fix it while you have it here. You need not worry about payment of the notes. Everything will be all right until your truck is either fixed up or we will do something."

The truck was then placed in the garage, where it was thoroughly overhauled. A few days later, it was

July 1920]

Opinion Per MAIN, J.

delivered to Noel again, who sent it out to haul gravel from the waterfront in Seattle to a paving job on Rainier avenue. During the first trip, the motor heated and missed and the driver, when he reached the top of the grade, was compelled to stop and let it cool off. He finally delivered the load and started back to the city. On the return the motor continued to miss and, as he attempted to cross the car tracks, it stalled and an approaching street car rolled into it, causing serious damage to the frame and other parts of the truck. The truck was then towed to a garage near that of the Garford company. The motor was loosened from the frame and was taken to the Garford company for repair, while the straightening of the frame was done in the other garage. The Garford company, by arrangement made at the time, was not to charge anything for labor performed, and Noel was to pay for new parts that might be necessary in restoring the truck from its broken condition caused by the collision. After the truck was repaired, Noel tested it and discovered that it had the same tendency to heat and knock as it had during all the time that he had used it, and declined to have anything further to do with it. The truck was sold under a warranty which is referred to as "standard form" warranty. It is unnecessary here to set out the warranty, because there seems to be no controversy over the fact that, up to the time the car was returned to Seattle, it had not fulfilled the warranty. It had been kept and used under the repeated assurance of Krause that it would be made to work, and, as already stated, mechanics were, on a number of occasions, sent by the Garford Truck Company to put the truck in condition. Under the evidence, there can be no question but what the motor was defective. The trial court entered a decree cancelling the notes and

mortgage which had been given for the balance due on the purchase, less the sum expended in the purchase of new parts.

Under the heading "Argument," in the appellant's brief, it first propounds the question, "Could the respondents rescind at the time they attempted to do so?" Answering this question, if we have gathered the argument correctly, two principal contentions are made, the first of which is that Noel had retained and used the truck for such a length of time that it would be inequitable to permit a rescission. In support of this position, reliance is placed upon the general rule that, where an article is sold and does not meet the requirements of an express warranty, failure to give notice, or failure to return the property within a reasonable time after discovering the defects, operates as a waiver of the right to rescind and leaves the purchaser only the right to recover or offset damages. *Dickinson Fire etc. Brick Co. v. Crowe & Co.*, 63 Wash. 550, 115 Pac. 1087; *Fink v. Marr*, 81 Wash. 92, 142 Pac. 482. But that rule is not applicable to the facts in this case. While the truck was used for a considerable time, it was retained in reliance upon the assurance of Krause that it would be put in such condition as to satisfy the warranty. Repeated efforts were made by mechanics sent by Krause to put the motor in good working condition, but without success. Diligence in rescission is a relative question. What is unreasonable delay in a given case must depend upon particular circumstances. Delay in formal decision induced by the promise of the vendor to make the machinery work properly is not a waiver of the right to rescind. *Schroeder v. Hotel Commercial Co.*, 84 Wash. 685, 147 Pac. 417. In the present case, under the facts and circumstances, the truck was not retained

July 1920]

Opinion Per MAIN, J.

and used for an unreasonable time before rescission was attempted.

The appellant's second contention is that, since the truck had been damaged in a collision with a street car, the right of rescission does not exist. In this connection, reliance is placed upon the rule that, where property while in the possession of the purchaser has been damaged to such an extent that the parties cannot be placed *in statu quo*, the remedy of the purchaser is one of damages and not rescission. *Burnley v. Shinn*, 80 Wash. 240, 141 Pac. 326, Ann. Cas. 1916 B 96. This rule contemplates that, where rescission is attempted, the article purchased must be returned in substantially as good condition as when received, and the inability to return it in such condition is due to the fault of the purchaser. If the repairs did not effect a material change in the truck or substantially alter its condition, there is no reason why it could not be lawfully returned to the seller. *Mechem on Sales*, vol. 2, § 819; *Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032. The motor truck, after its repair, was in substantially as good a condition as it was prior to the accident. In addition to this, the evidence shows that the collision was brought about by the stalling of the truck due to a defective motor, and that the driver was free from fault in attempting to cross the street car tracks at the time and place that he did.

The judgment will be affirmed.

HOLCOMB, C. J., PARKER, TOLMAN, and MITCHELL, JJ.,
concur.

[No. 15699. Department One. July 22, 1920.]

ALLISON BURNHAM, *as Executor etc., Appellant, v.*
MABEL A. ROWLEY, *as Executrix etc.,*
*Respondent.*¹

WITNESSES (46)—COMPETENCY—ADMISSIONS OF PERSONS SUBSEQUENTLY DECEASED. A ledger account kept by a person since deceased, the entries therein being proven to be original, is admissible upon a dispute as to the amount of payments made upon a promissory note held by the deceased, where his executor testified that prior to filing his inventory, the account was shown to the debtor, also since deceased, and he admitted the same to be correct; the weight of the executor's evidence, however, being governed by the rule relating to conversations with a deceased person.

BILLS AND NOTES (142)—PAYMENT—EVIDENCE—SUFFICIENCY. In an action on a promissory note given to the deceased, a payment thereon of \$2,000, and not \$3,000, as claimed by the debtor, is sufficiently shown, although deceased signed and gave a receipt reciting that \$3,000 was on that date received as part payment on the note, where the receipt stub and the indorsement on the back of the note indicated a payment of but \$2,000, the ledger account kept by the executor showed the same amount, subsequent payments of interest on the remaining principal showed overpayment if the debtor's claims were accepted as true, and another circumstance indicated a probable mistake in writing the receipt.

EQUITY (41)—EXECUTORS AND ADMINISTRATORS (149)—LACHES—LIMITATIONS—EFFECT OF DELAY. Delay of an executor in instituting an action to recover a claimed balance due on a promissory note for a period of five years should not affect the right to recover any sum justly due the estate; especially where, if the principal of the note had been fully liquidated, the debtor would have had a right of action for recovery of the note; since there was as much delay on his part as upon the part of the executor in instituting the action.

Appeal from a judgment of the superior court for Clarke county, Reynolds, J., entered August 7, 1919, upon findings in favor of the defendant, in an action on a promissory note, tried to the court. Reversed.

¹Reported in 191 Pac. 811.

July 1920]

Opinion Per MAIN, J.

McMaster, Hall & Drowley, for appellant.*Crass & Hardin*, for respondent.

MAIN, J.—The purpose of this action was to recover the balance claimed to be due upon a promissory note. The plaintiff is the executor of the last will and testament of William C. Hazard, deceased. The original defendants were Edson M. Rowley and wife. Subsequent to the time the action was instituted, and prior to the time it came on for trial, Mr. Rowley died and Mrs. Rowley, as executrix of his last will and testament, was substituted as a party defendant. The cause was tried to the court without a jury, and resulted in a judgment dismissing the action. From this judgment, the plaintiff appeals. The facts are not in substantial dispute.

On April 8, 1911, at Vancouver, Washington, Mr. Hazard loaned to Mr. Rowley the sum of \$7,500 and took a note signed by Mr. and Mrs. Rowley. The note provides for interest at eight per cent per annum, payable semi-annually. On October 8, 1911, the first installment of interest became due and was paid, the sum being \$300. A like payment was made on April 8, 1912. For each of these payments Mr. Hazard wrote and delivered to Mr. Rowley a receipt. The payments are also indorsed on the back of the note. On October 8, 1912, an interest payment of \$300 was made and, as the appellant contends, \$2,000 on the principal. The respondent admits the interest payment of \$300 on this date, but claims that the payment on the principal was \$3,000 instead of \$2,000. Subsequently and on March 24, 1914, a payment of \$4,500 was made on the principal. If the appellant's contention as to the prior payment is correct, there was still a balance due of \$1,000, aside from interest. If the respondent's con-

tention be correct, this last payment liquidated the principal of the note.

Upon the trial, the appellant offered in evidence the ledger account kept by Mr. Hazard covering this transaction, after proving the entries therein to be original. This item of evidence was excluded. Whether the ledger account was admissible under what is known as the "shop book rule" need not here be determined. The appellant testified that, just prior to the time he filed his inventory, this account was shown to Mr. Rowley and he then admitted that it was correct. Under this testimony, we think the account should have been admitted in evidence. The testimony of the appellant which made it admissible, being a conversation with a now deceased person, the evidence must be weighed in accordance with the rule in such cases. As shown by the account, the payment on the principal on October 8, 1912, was \$2,000. At the time the payment was made, Mr. Hazard wrote and signed a receipt in which it is recited that \$3,000 was on this day received as part payment on the principal of the note. At the same time, he wrote the receipt for \$300 for the interest payment.

The principal question in the case is whether this receipt has been overcome by the other evidence in the case, which is substantially as follows: The receipt stub shows a payment of \$2,000. The indorsement on the back of the note is \$2,000, and, as already indicated, the ledger record made by Mr. Hazard was \$2,000. On April 8, 1913, an interest payment of \$220 was made, for which a receipt was given by Mr. Hazard. This was eight per cent on \$5,500 for six months. If a \$3,000 payment had been made, as claimed by the respondents, Mr. Rowley was voluntarily paying more interest than was due upon the note at the time. Sub-

July 1920]

Opinion Per MAIN, J.

sequent to this time and prior to October 8, 1913, when the next interest payment became due, Mr. Hazard died. On the latter date an interest payment of \$220 was made to his executor. When the payment in controversy was made, Mr. Rowley gave a check to Mr. Hazard for \$2,300, \$300 of which was for interest. It is suggested that the other thousand dollars claimed to have been paid was in cash. There is some evidence that it was Mr. Rowley's custom to pay all larger sums by check. There is also some evidence that he sometimes paid cash. There is one other item of evidence which seems quite persuasive, and that is the ledger account of Mr. Rowley. Under date of October 8, 1912, it recites a payment of \$300 interest and \$2,000 on the principal of the note. Under the evidence thus detailed, the conclusion seems irresistible that the payment in controversy was \$2,000 and not \$3,000. Mr. Hazard at the time having just written the receipt for \$300 interest, probably continued to use the "three" in front of the thousand, when receipting for the principal, instead of "two."

Some mention is made of the fact that the action was not instituted for approximately five years after the last payment was made. The fact that the executor may have delayed this period of time should not militate against his right to recover any sum that may be justly due the estate which he represents. In addition to this, if the principal of the note had been fully liquidated when the \$4,500 payment was made, Mr. Rowley would have had a right to an action for the recovery of the note. There was equally as much delay upon his part as upon the part of the appellant in instituting the action.

This is not a case where the oral testimony was in conflict upon any material matter and the trial court,

after hearing the testimony, had made a finding thereon. It is a question of the proper inference to be drawn from the undisputed evidence. In our opinion, the evidence establishes the fact that the payment in controversy was \$2,000 and not \$3,000.

The judgment will be reversed, and the cause remanded with directions to the superior court to enter a judgment for the balance due upon the principal of the note, together with interest.

HOLCOMB, C. J., PARKER, BRIDGES, and MITCHELL, JJ., concur.

[No. 15860. Department Two. July 22, 1920.]

MARIA OLSEN *et al.*, *Respondents*, v. PEERLESS LAUNDRY,
Appellant.¹

APPEAL AND ERROR (386)—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR—ACQUIESCENCE OR WAIVER. If defendant puts in evidence after refusal of a nonsuit, the plaintiff is entitled to receive any and all benefits therefrom.

MUNICIPAL CORPORATIONS (379, 389)—USE OF STREETS—COLLISION AT CROSSINGS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Negligence of the driver of an auto truck in colliding with a pedestrian at a street intersection is shown by his testimony that he saw the plaintiff, evidently unaware of his approach and crossing the street in line of a collision, that he was driving slowly in low gear and could have stopped within three or four feet, and that he did not alter his course, slacken his speed, or give warning of his approach; it being the duty of a driver to sound his horn in all cases where it would probably avoid an accident.

SAME (379, 380)—NEGLIGENCE—VIOLATION OF ORDINANCE—RIGHT OF WAY AT CROSSINGS. Under an ordinance giving to pedestrians the right of way at street intersections, pedestrians are not required to stop and yield the right of way as a matter of right to drivers of trucks and automobiles.

SAME (383, 391)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a pedestrian struck by an auto truck at a street crossing

¹Reported in 191 Pac. 756.

July 1920]

Opinion Per BRIDGES, J.

was guilty of contributory negligence in failing to look a second time, is a question for the jury, where both she and her companion testified that they looked before proceeding across the street and saw no approaching vehicle and the way was apparently clear; since the duty to do so would depend on the surrounding conditions and whether she had the right of way.

WITNESSES (74)—CROSS-EXAMINATION—SCOPE AND EXTENT. In an action for personal injuries sustained by a pedestrian at a street intersection through collision with an auto truck, an objection to a question asked plaintiff's companion on cross-examination as to the subject of their conversation, is properly sustained, though it might have been proper cross-examination had the purpose been to find out whether they were talking at the time.

DAMAGES (84)—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,458, for injuries sustained by a pedestrian struck by a motor truck, is not excessive, where there was a fracture of the neck of the left femur, the plaintiff was in bed for over six weeks and suffered much during that time, she could get about only on crutches at the time of the trial, and the medical testimony showed that it was questionable whether there would be a bony union of the parts, that the limb was one-half inch shorter than before the accident, and that the injury would probably be permanent.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 7, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by a motor truck. Affirmed.

William Wray, for appellant.

McClure & McClure (*Walter S. Osborn*, of counsel), for respondents.

BRIDGES, J.—This was a personal injury suit. The plaintiff Maria Olsen and her companion, Mrs. Peters, on the 20th day of February, 1919, were walking easterly on the north sidewalk of Pine street, in the city of Seattle, Washington, intending to cross Third avenue. When they reached the intersection of these streets, and before stepping into Third avenue, they each looked north and south on Third avenue to see

whether there were any approaching vehicles, and observing that the way was clear, and seeing nothing approaching, they started across Third avenue in the line of the north sidewalk of Pine street. When they had proceeded about two-thirds of the way across the street, the defendant's auto truck or delivery wagon suddenly loomed up in front of them, just missing, but brushing the clothing of Mrs. Peters, who was on the right of Mrs. Olsen, that being the direction from which the truck came, and striking Mrs. Olsen, probably with the rear fender, knocked her down, causing her serious injury.

At the time in question, there was considerable traffic on Pine street, but apparently none on Third avenue within the immediate vicinity of this crossing. Neither the plaintiff nor her companion saw the approach of the truck. The driver of the truck testified that he approached Pine street from the south on Third avenue, and found travel on Pine street such that he was required to and did stop near the curb at the southerly intersection of these streets. As soon as the traffic on Pine street had cleared, he started across in low gear, going at the rate of six or eight miles per hour until his truck struck the plaintiff. When he was on the street car tracks on Pine street, which would be about the center of that street, he observed the plaintiff and her companion crossing Third avenue at the sidewalk crossing. When within five or six feet of them, he again observed the pedestrians, and should have realized, and probably did realize, that, unless he or they stopped or changed course, there would be a collision. He did not, however, change his course, slacken his speed, blow his horn, or give any other signal of his approach, but went ahead, assuming that the plaintiff and her companion would stop and allow him to pass

July 1920]

Opinion Per BRIDGES, J.

in front of them. At the close of plaintiff's testimony, the defendant moved for a nonsuit, which the court denied. At the close of the taking of all the testimony in the case, the defendant asked for an instructed verdict in its favor, which was also denied. The court likewise denied its motion for a new trial. There was a verdict for the plaintiff in the sum of \$5,458. From the judgment entered on this verdict, this appeal is taken.

The appellant contends that the testimony fails to show any negligence on the part of the driver of the auto truck, but does show contributory negligence, as a matter of law, on the part of the plaintiff Mrs. Olsen. In considering these questions, we must take into consideration all the testimony in the case. The appellant having proceeded to put in its testimony after the court's refusal of its motion for nonsuit, the respondent is entitled to receive any and all benefits therefrom. *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471.

The testimony of the driver of the truck or delivery wagon was sufficient in itself to take the case to the jury on the question of negligence. He says he was driving his car across Pine street at a speed of about six or seven miles per hour, and could have stopped it within three or four feet; that, when he reached the center of Pine street, he saw the plaintiff and her companion walking across Third avenue, and that, at that time, they were about halfway across that street. When within five or six feet of these pedestrians, the driver again saw them, and must have realized that it would be necessary that he or they must do something to avoid a collision. He frankly admits that, under these

circumstances, he did not alter his course, nor stop, nor slacken his machine, nor blow his horn, nor give other warning of his approach, but went straight ahead because he thought or supposed that the plaintiff and her companion saw him or would see him, and that they would stop and allow him to pass in front of them. Plainly, in so driving, he was guilty of negligence. He had no right to conclusively presume that the plaintiff or her companion saw him or would see him, and that they would get out of his way. The conduct of these ladies, and all the surrounding circumstances, show, and should have indicated to the driver, that they were not aware of his approach. Under these circumstances, ordinary precaution and care would have required him to blow his horn, slow down, stop, or swerve to the right or left. Any one of these acts would probably have avoided the injury.

Again, there was introduced in evidence an ordinance of the city of Seattle which expressly gave to pedestrians the right of way at street intersections. It may be difficult to lay down any fixed rule showing just what rights and privileges this right of way may give to pedestrians or take from the drivers of automobiles. It certainly does not mean that the driver of a truck or automobile would have the right to use the intersection without any regard for the rights of the pedestrians, or in such manner as would require the latter, as a matter of right, to stop and yield the right of way. As was said in the case of *Johnson v. Johnson*, 85 Wash. 18, 147 Pac. 649:

“If the conceded right of way means anything at all it puts the necessity of continuous observation on the driver of the automobile when approaching a crossing, just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than at crossings.”

July 1920]

Opinion Per BRIDGES, J.

In this case it seems to us that each act of the driver of the auto delivery was on the assumption that he had the right of way and that the pedestrians must stop and yield to him. Aside, however, from the question of right of way, we are greatly impressed with the idea that, had the driver used his horn, this accident would not have happened. Drivers of automobiles and auto trucks should know that the law will insist that they must sound their horns on all occasions where it can be said that, had such been done, an accident might or probably would have been avoided. We have no question, therefore, that there was amply sufficient testimony to take the case to the jury on the question of the negligence of the driver of the auto truck.

But it is strongly insisted that the testimony shows that the plaintiff was guilty of contributory negligence, as a matter of law. With this contention we cannot agree. What we have already said concerning the right of way is applicable to this branch of the case; but, aside from that question, there was sufficient testimony to take the case to the jury. Both Mrs. Olsen and her companion testified that, when they reached Third avenue and before stepping down onto that street, they looked north and south on Third avenue and did not see any vehicle approaching and found the way to be apparently clear. All of the circumstances would indicate that, at the time they so looked, the appellant's delivery wagon was standing near the curb on the south side of Pine street awaiting an opportunity to cross that street. It is true the testimony for the plaintiffs is not very clear whether, after stepping onto Third avenue, Mrs. Olsen thereafter looked for approaching vehicles; but we cannot say, as a matter of law, that such was her duty. We have, time and again, said that one must, before undertaking to cross a

street, look for approaching vehicles, but whether, after so doing and while making the crossing, he must again look or continue to look, depends on many circumstances and conditions; such as the amount of traffic; the probability of there being approaching vehicles; whether the statutes or ordinances give him the right of way; whether other objects or things have attracted his attention. Manifestly this is a question for the jury. This identical question has been before this court in a number of cases. In the case of *Redick v. Peterson*, 99 Wash. 368, 169 Pac. 804, Judge Holcomb, speaking for the court, said:

“The question then is, whether it is contributory negligence for a pedestrian, after having looked once in a direction along the street for vehicles that might interfere with safe passage across the street, at a regular street crossing, and in other necessary directions along the street, to fail to look a second time in the first direction. We think not, as a matter of law.”

See, also, *Johnson v. Johnson*, *supra*; *Adair v. McNeil*, 95 Wash. 160, 163 Pac. 393. In the case of *Chase v. Seattle Taxicab & T. Co.*, 78 Wash. 537, 139 Pac. 499, this court said:

“Upon the second proposition, it is equally obvious that the question of the contributory negligence of the respondent was for the jury. The respondent saw the taxicab a block to the south, and proceeded in a uniform course without hesitation or vacillation. Whether his failure to look a second time was such negligence as to prevent a recovery was for the jury.”

The cases from which we quote cite many of the authorities on this question.

The appellant, in cross-examining Mrs. Peters, who was crossing the street with Mrs. Olsen, asked the following question: “What was the talk going on between you and Mrs. Olsen from the time you left the

July 1920]

Opinion Per BRIDGES, J.

Standard Furniture Company until the time you got to Third and Pine and started to cross?" Objection to this question was sustained. Appellant predicates error thereon. It contends that it had a right to show what these ladies were talking about, for the purpose of indicating whether they were paying attention to approaching vehicles. If the purpose of the question had been to find out whether these ladies were talking, it might have been proper cross-examination, but the subject of their conversation could not possibly lend any light to the jury. Appellant also complains of certain other rulings of the court with reference to the introduction of testimony. We have carefully considered them and do not find any error in them.

It is next contended that the verdict is excessive. The testimony shows that, as a result of this injury, there was a fracture of the neck of the left femur about three-quarters of an inch below the head of the femur. The plaintiff was required to stay in bed for more than six weeks, during all of which time she suffered much. At the time of the trial, she could get about only on crutches. The medical testimony was to the effect that there had not been a bony union, and it was very questionable whether there ever would be such; that the injured limb was, at the time of the trial, about one-half inch shorter than it was before the injury, and that the injury was, in all probability, permanent. Under these circumstances, we cannot say the verdict is excessive.

Finding no error, the judgment is affirmed.

HOLCOMB, C. J., FULLEBTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15858. Department Two. July 22, 1920.]

E. R. HUNTER, *Respondent*, v. COLIN O. RADFORD *et al.*,
Appellants, GEORGE W. THORNE *et al.*, as the
Seattle Hotel News, Defendants.¹

SALES (54)—BREACH—RESCISSION BY BUYER—FAILURE TO DELIVER POSSESSION. Under a contract for the sale of the personal property and leasehold of a hotel, the contract to be performed within ten days and providing that time was the essence thereof, and that the title to the property should be made good within such time or the agreement to be void, failure of the defendant to deliver possession of the property through failure to acquire title thereto entitles the purchaser to rescind the contract and recover earnest money paid thereon.

SAME (59)—RESCISSION BY BUYER—CONDITIONS PRECEDENT—TENDER OF PURCHASE PRICE. Conceding that the delivery of possession and tender of payment were concurrent acts, under a contract for the purchase of a lease and hotel equipment the purchaser may rescind and recover earnest money paid, without first tendering payment and demanding possession, it being known that he had the money in his possession and was able and willing to perform, but that defendant was unable to deliver because unable to acquire the right of possession within the time limited.

Appeal from a judgment of the superior court for King county, Jurey, J., entered January 13, 1920, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Tucker & Hyland and *William C. Keith*, for appellants.

Howard O. Durk, for respondent.

MOUNT, J.—In September, 1918, E. R. Hunter entered into a written contract with the Seattle Hotel News, acting as agent for Colin O. Radford, as follows, omitting immaterial portions:

“Seattle, Wash., Sept. 7, 1918.

“Received of E. R. Hunter two thousand dollars as earnest money and in part payment for the purchase

¹Reported in 191 Pac. 794.

July 1920]

Opinion Per MOUNT, J.

of certain personal property in Multnomah county, Oregon, particularly described as follows: All furniture, equipment, fixtures, electric bus, leasehold of Cornelius Hotel, Park and Alder streets, Portland, for thirteen years, at \$890 per month, together with all improvements thereon, which we have this day sold to the said E. R. Hunter for the total purchase price of thirty-five thousand (\$35,000) dollars on the following terms, to wit: Two thousand (\$2,000) dollars as herein receipted for, eight thousand dollars on date of possession on or before September 16th, 1918, and balance of \$25,000 in monthly payments of \$600 per month until satisfied, with interest on balance of 7 per cent per annum, payable semi-annually. . . .

"It is agreed that if the title to said property is not good or cannot be made good in ten days, or if the owner does not approve of the above sale, this agreement is void, and the earnest money herein receipted for shall be refunded, but if the title to said property is good and the above sale is approved by the owner, and the purchaser neglects or refuses to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited as liquidated damages to the owner of said property. . . .

"Time is the essence of this contract.

"Seattle Hotel News.

"By S. P. Barash.

"I hereby agree to purchase the above property on the above terms.

E. R. Hunter."

On the 16th day of September, Mr. Hunter employed a manager for the hotel and sent him from Seattle to Portland to receive the property on the 16th day of September. After this manager had gone to Portland, the agent in Seattle informed Mr. Hunter that the owner of the building would not be ready to deliver possession on the 16th, but that he would be ready to do so very shortly. On the 23d of September, 1918, Mr. Barash, the agent in Seattle, informed Mr. Hunter that the owners of the hotel were ready for him to take possession. Thereupon, Mr. Hunter procured \$8,000

from the bank in Seattle and he and Mr. Barash went to Portland for the purpose of closing the contract. When they arrived in Portland, Mr. Hunter was informed that possession could not be given at that time. He waited until the 27th day of September, when he demanded the return of his money because possession of the hotel had not been given. Thereafter he brought this action to recover the deposit of \$2,000 which he had paid at the time the contract was entered into. The agents, George W. Thorne, S. S. Barash and S. P. Barash, doing business as the Seattle Hotel News, and Mr. Radford and his wife, were all made parties.

After issues were joined, the case was tried to the court without a jury. Upon the trial of the case, when it appeared that the \$2,000 had been paid over to Mr. Radford, who was supposed to be the owner of the property, and when it appeared that Mr. Radford had approved the contract, the agents were dismissed from the action. The trial proceeded as against Mr. Radford and wife, and resulted in a judgment in favor of the plaintiff, Mr. Hunter, for \$2,000. The defendants Radford and wife have appealed from that judgment.

On the trial of the case, the evidence was conclusive to the effect that Mr. Hunter had paid the \$2,000 at the time the contract was signed; that he went to Portland with the agent who prepared and signed the contract; that he took \$8,000 along with him, which fact was known to this agent, for the purpose of obtaining possession of the property on the 16th or later, if it could be given. When he arrived in Portland, Mr. Hunter learned that title to the property had not been acquired by Mr. Radford and Mr. Radford was not in a position to deliver possession. Mr. Hunter waited until September 27, and then, when possession was not offered him, he demanded the return of his \$2,000, which

July 1920]

Opinion Per MOUNT, J.

was refused. The defense was that the time was extended until October 1, and that, after October 1, Mr. Hunter himself defaulted in the payment, and therefore, under the contract, he was not entitled to the return of his \$2,000. Whether or not there was an extension of time was a disputed question. Mr. Hunter testified positively that he made no agreement to extend the time to October 1. Mr. Radford, on the other hand, testified that there was an agreement to that effect. Upon this disputed testimony, the trial court was of the opinion, we think correctly, that there was no extension of the time to October 1 in which the contract should be performed.

The contract upon its face was to be performed within ten days, namely, on September 16, 1918. It provided that time was the essence of the contract. The contract also provided that \$8,000 was to be paid on the date of possession, and that, "if the title to said property is not good or cannot be made good in ten days, this agreement is void." We think there can be no escape from the conclusion that, after the 16th day of September, 1918, if Mr. Hunter was not put in possession of the property, he was entitled to his \$2,000 back. He was not put in possession of the property within that time, and he therefore had a right to rescind the contract at any time. He did so on the 27th day of September.

It is argued by the appellants that, before the respondent was entitled to rescission, it was his duty to tender the payment of \$8,000. We think, according to the terms of the contract, the \$8,000 was not due until possession was given; but if we concede, for the purposes of this case, that the delivery of possession and the tender of payment were concurrent acts, the evidence clearly shows that Mr. Hunter had the money

in his possession with which to make the payments, and Mr. Barash, the agent of the appellant, knew this fact and knew that Mr. Hunter was in Portland for the purpose of taking possession, and up until the 27th day of September, the appellant was not in a position to deliver possession, because he, at that time, had not acquired the right of possession of the property, and did not do so, according to his own evidence, until October 1, 1918. Under these circumstances, it was not necessary for the respondent to tender the \$8,000 and demand possession, because it was known that appellant at that time could not deliver possession.

The judgment of the trial court was clearly right and is therefore affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15697. Department One. July 22, 1920.]

E. R. A. SCHWARZMILLER, *Appellant*, v.
ELLEN A. SCHWARZMILLER,
Respondent.¹

ACTIONS (31)—COMMENCEMENT OF ACTION—PROCEEDINGS CONSTITUTING—SERVICE OF PROCESS. The failure of a party to make personal service or commence service by publication within ninety days from the date of filing the complaint, as required by Rem. Code, § 220, does not lose plaintiff his cause of action or right to serve a complaint and summons at a subsequent time, upon the court's order allowing the complaint to be refiled.

ACTIONS (17)—CHANGE OF CHARACTER OR FORM. Where there had been no service of process and the defendant had not appeared in an action for separate maintenance, the court, upon allowing an amendment to change the action to one for divorce, is within its powers in permitting the change and ordering that the complaint may be deemed refiled as of a later date to give the court jurisdiction of the action for divorce.

¹Reported in 191 Pac. 808.

July 1920]

Opinion Per MITCHELL, J.

PLEADING (112) — AMENDMENT OF COMPLAINT — JURISDICTION — CHANGE IN FORM OF ACTION — DIVORCE. A complaint in an action for separate maintenance, where no service of process was had, may be amended on application of the plaintiff so as to state a cause of action for divorce.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered March 4, 1919, upon findings in favor of the defendant, dismissing an action to annul a marriage, tried to the court. Affirmed.

Coleman & Fogarty and *Q. A. Kaune*, for appellant.
E. C. Dailey and *A. E. Dailey*, for respondent.

MITCHELL, J.—On May 1, 1918, E. R. A. Schwarzmiller commenced this action in the superior court of Snohomish county, against his wife, Ellen A. Schwarzmiller, for a decree of nullity of their marriage solemnized on January 3, 1917. He has appealed from a judgment denying any relief and dismissing the action.

Respondent and one Thomas D. Murphy intermarried in the year 1899. He was living at the date of the commencement of the present suit. It is the claim of respondent that she was divorced from her former husband by a decree of the superior court of King county, Washington, filed therein on March 17, 1905. On the contrary, appellant contends the divorce proceedings in that case were fatally defective and that the decree is void.

The record in that case shows substantially the following facts and proceedings: On September 20, 1903, Murphy and his wife came to Seattle to live. On June 7, 1904, she filed in the superior court of King county a summons and complaint against her husband for separate maintenance. No service of any kind was had, or attempted to be had, on the defendant therein

prior to December 5, 1904, at which time the court made and signed a written order reciting that it was made upon her application to amend her complaint and the prayer thereof in certain formal particulars that were enumerated so as to make it a complaint for a divorce, and further reciting that she had now resided in King county continuously for more than a year, and that the complaint stated facts sufficient to support an application for a divorce upon two grounds; first, cruel treatment; second, neglect to make suitable provisions for the family, etc. The order further provided that the complaint be deemed filed as of the third day of December, 1904, that the complaint be amended as indicated and that the order be made a part of the complaint, and that a copy of the complaint as amended be served upon the defendant therein. The order was duly filed on December 5, 1904, in, and became a part of, the record in that case. On December 17, 1904, the sheriff made a return of not found, on a twenty-day summons in the case. Promptly there was made and filed a due and proper affidavit, followed by publication of summons, of which publication proof by affidavit was filed on February 20, 1905. On February 20, 1905, default was entered against the defendant, and on March 4, 1905, the court, upon the trial of the divorce case, made its findings, conclusions and decree in favor of the plaintiff therein, which were filed with and entered by the clerk on March 17, 1905.

In the present case, it is the contention of appellant that the complaint for separate maintenance, filed in the case of *Murphy v. Murphy*, could not thereafter be converted or amended into a complaint for divorce, or at all. That it had lost its efficacy for any purpose, since there had been no personal service, or the commencement of service by publication therein within

July 1920]

Opinion Per MITCHELL, J.

ninety days from the date of filing the complaint, and in the absence of any appearance on the part of the defendant therein.

Section 220, Rem. Code, provides that civil actions in the superior court shall be commenced by the service of a summons, or by filing a complaint with the clerk of the court, "Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint." It appears, therefore, that, prior to December 5, 1904, Mrs. Murphy had not commenced any action against her then husband, having only filed a summons and complaint on June 7, 1904. But even after the expiration of ninety days, she had not lost all her rights, for, as was said in *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049:

"But a party does not for these reasons lose his cause of action or his right to serve a complaint and summons at a subsequent time."

After the expiration of the ninety days, and after she had been living in the state more than a year, she applied to the court on December 5, 1904, for leave to amend her complaint concerning the length of her residence in this state and to change its prayer to one for divorce. Those were the only respects in which the original complaint was lacking to allow proof of cause for a divorce which she then claimed she was entitled to. At the time of asking leave to amend, the defendant therein had no control whatever over the matter. He had neither been served with process nor had he appeared in the case. The matter was entirely under the control of the plaintiff therein and the court in whose clerk's office the summons and complaint were

on file. Unquestionably, under those circumstances, the court was within its powers and discretion to permit the amendment and suggest the form therefor as provided in the order. The making and filing of the order constituted the amendment to the complaint, which was adjudged and to be considered as filed on December 3, 1904. That was shown by the very terms of the order, which were accepted and adopted by the plaintiff as an amendment to the complaint. It was after the complaint was thus amended and considered as refiled by the order of the court that service was had on the defendant therein by the publication of a sixty-day summons, commenced on the 20th day of December, 1904. The summons, as the affidavit of publication discloses, stated that the action was one for divorce. So far as the rights of the defendant therein were concerned, as well as the jurisdiction of the court over the marriage relation of the parties, the action was upon the complaint as amended, of which the record gave ample and complete information; and the failure to commence the action as intended at the time of filing the original complaint should cause no confusion, nor does it weaken the efficacy of the subsequent proceedings, including the amendment to the complaint, the service by publication of summons, order of default, trial, findings and conclusions, and decree of divorce.

It is further contended that the summons published in the divorce case inadequately stated the object of the action. We are satisfied, however, that it sufficiently answers the requirements of the statute—subd. 4, § 228, Rem. Code.

Judgment affirmed.

HOLCOMB, C. J., PARKER, BRIDGES, and MAIN, JJ.,
concur.

July 1920]

Statement of Case.

[No. 15798. Department One. July 24, 1920.]

LEWIS A. COONS *et al.*, Respondents, v. OLYMPIA LIGHT
& POWER COMPANY, Appellant.¹

STREET RAILWAYS (29)—OPERATION—ACTIONS FOR INJURIES—COLLISION—NEGLIGENCE—QUESTION FOR JURY. In an action for damages from a collision between a street car and an automobile, the negligence of the company is for the jury, where it had obstructed the right-hand side of the street by a street car, waiting upon a switch to meet another car, requiring the driver of the automobile to pass around and over the main tracks, and a street car, approaching on a dark, rainy night, failed to sound any warning of its approach.

SAME (30) — OPERATION — ACTION FOR INJURIES — CONTRIBUTORY NEGLIGENCE. In such a case, the contributory negligence of the driver of the automobile is a question for the jury, where there was evidence that his vision was obscured by rain on the windshield and by the lights of many automobiles and the fully lighted street car on the spur track, and that he looked around the windshield and saw no car approaching, and turned out to pass around the standing car and was struck by the oncoming car which he failed to see.

SAME (25)—NEGLIGENCE OF MOTORMAN—EVIDENCE—ADMISSIBILITY. In an action for injuries from a collision between a street car and an automobile, although the negligence primarily relied on was the obstruction of the right side of the street, it was proper to admit testimony that the motorman could have stopped his car before hitting the automobile, since defendant's negligence is to be determined by all the circumstances of the case, including the manner in which the car was being operated.

SAME (27)—RATE OF SPEED—EVIDENCE—ADMISSIBILITY. In an action for injuries from a collision between a street car and an automobile, where the complaint alleged that the speed of the oncoming car contributed to the injury, but did not allege that such speed was excessive, the admission of evidence that it was "coming pretty fast" is not error, since the plaintiff had a right to show the car's actual speed, from which the jury might determine whether defendant was negligent in that regard in approaching an obstructed street intersection.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered October 18, 1919,

¹Reported in 191 Pac. 769.

upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages sustained in a collision between a street car and an automobile. Affirmed.

Troy & Sturdevant and Poe & Falknor, for appellant.

Harry L. Parr and T. M. Vance, for respondents.

MACKINTOSH, J.—Fourth street, in Olympia, runs in an easterly and westerly direction, and upon it the appellant operates a single track street car line. Easterly from Chestnut street, Fourth street rises for a short distance, then slopes slightly to the east, and then for a considerable distance continues on a sharp upward grade. At the intersection of Fourth and Chestnut streets, a spur track extends southerly for a couple of blocks to the appellant's car barns. The track on Fourth street is laid to the north of the center of the street.

A collision occurred at the intersection of Fourth street and Chestnut between a car owned by the appellant and the automobile owned by the respondent. An action was begun for the recovery of damages occasioned by this collision, and from a verdict and judgment in favor of the respondents, this appeal has been prosecuted.

The appellant claims that there was not sufficient evidence in the case to warrant its submission to the jury, and that the court should have held, as a matter of law, that the injury complained of was occasioned not by the negligence of the appellant, but by the negligence of the respondent. It therefore becomes necessary to examine the testimony in this case to determine whether there was presented a question of fact for the jury to pass upon.

July 1920]

Opinion Per MACKINTOSH, J.

The evening of November 13, 1918, was a dark and rainy one in Olympia, and somewhere about six o'clock the respondents came from the south into Fourth street, a few blocks to the west of Chestnut street, and proceeded in an easterly direction toward their home. Observing the rules of the road and the statutory requirement that he drive his automobile on the south side of the street, respondent kept as near as possible to the curb at his right. At the intersection of Fourth and Chestnut streets the appellant had parked a car, loaded with passengers, upon the spur track. This car was waiting the passage of a west-bound car so that it might then back into the main track and proceed easterly upon its trip. This car was twenty-six feet, four inches, in length, with a fender which extended in front the further distance of two and one-half feet. Upon the rear was a fender which extended eighteen inches from the body of the car, thus making the total length of the obstruction thirty feet, four inches. The distance from the south rail of the street car track to the curb line of Fourth street was twenty-seven feet. The evidence is in dispute as to how far the standing car was in upon the spur track, but, taking the evidence in its most favorable light to the respondent (as we must in considering the question of whether there was sufficient evidence to go to the jury), it shows that the car was standing in such position that, in order to pass to the north of it, it was necessary for the left wheel of respondent's automobile to pass over the south rail of appellant's track. The testimony justified the jury in arriving at the conclusion that it was impossible for the respondent to pass to the south of the standing car, as to do so would have necessitated his driving upon the portion of Chestnut street reserved for pedestrians; in other words, to

have passed to the south of the curb line of Fourth street.

At the time, the street lights of Fourth street were lighted, and as they extended up the hill easterly on Fourth street, it was difficult to distinguish them from the headlight of a down-coming street car. This being a busy portion of the city and a busy time of the day, many automobiles were coming down the Fourth street hill and their headlights added to the confusion. The presence of the fully lighted street car standing on the spur track increased the difficulty of a clear and accurate vision. As the respondent approached the standing street car, he testified that he looked through the windshield, which was rain-spattered, and, as an extra precaution, looked to the left around the windshield and saw no street car approaching from the east, and then, as he came nearer to the rear of the standing car, he turned his automobile, which was of the width of five feet, three inches, to the north of the car, and was proceeding to pass it, when he was struck by appellant's street car, west-bound, which, prior to that time, he had not seen, although it carried the customary headlight, which was lighted. There was testimony in the case that no bell was rung or warning given of the approach of the car.

These facts presented a question for the jury to determine whether the appellant was negligent in obstructing the highway and being the cause of the injury, or whether the respondent had used ordinary care for his own safety. If the standing, lighted street car rendered the approach of the east-bound car undiscernible to the respondent, and the entire situation was such, considering the state of the weather and of the lights and obstruction, that a reasonably prudent man would have proceeded as did the respondent, the

July 1920]

Opinion Per MACKINTOSH, J.

jury would be justified in concluding that he was guilty of no contributory negligence.

The appellant desires this court to hold that the respondent should have been held guilty of contributory negligence upon the strength of certain decisions of this court, which, however, seem to us to be clearly distinguishable upon their facts.

The case of *Herrett v. Puget Sound T., L. & P. Co.*, 103 Wash. 101, 173 Pac. 1024, holds that the driver of an automobile cannot deliberately drive upon a street car track and excuse himself by saying that he looked, when, if he had looked, he could not have helped seeing the approaching car. In that case there was no excuse for the driver's failure to see the street car. In the instant case, the condition of the lights of the street and of approaching automobiles, and the standing obstruction created by the appellant in the street, all furnished reasons and excuses for the respondent's failure to see the car which ultimately struck him. It will not do to say that the respondent was guilty of contributory negligence because a passenger on the west-bound car witnessed the respondent's approach. *Steuding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058; *Bardshar v. Seattle Elec. Co.*, 72 Wash. 200, 130 Pac. 101; *McEvilla v. Puget Sound T., L. & P. Co.*, 95 Wash. 657, 164 Pac. 193, and *Devitt v. Puget Sound T., L. & P. Co.*, 106 Wash. 449, 180 Pac. 483, may be likewise distinguished from this case, in that here the driver of the automobile did not deliberately drive upon a street car track and attempt to say that he looked but did not see what could have been avoided had he looked. There was sufficient evidence here from which the jury could say that the respondent made reasonable use of his senses "to guard his own safety." *Bowden v. Walla Walla etc. R. Co.*, 79 Wash. 184, 140 Pac. 549.

In the cases relied on by the appellant, there were no physical facts or conditions, such as disclosed by the record in this case, to prevent or render difficult the view to be had of the approaching street car. It is urged that the respondent could have seen the approaching street car, had he looked, from three or four blocks to the west of the point of collision. As a matter of law, it is not his duty to look from that distance. It is a question for the jury to say whether he should have done so. This case seems to fall squarely within the decision of *West Chicago Street Ry. v. O'Connor*, 85 Ill. App. 278, where the street car company had obstructed a portion of the street outside of its tracks by pushing snow from that part of the street upon which its tracks were laid, and had also obstructed one of its tracks with a repair wagon, so that there remained only the other track upon which vehicles might drive. In that case the court held it was incumbent upon the street car company's employees to be more watchful and cautious than they would be if the whole street were open and unobstructed to persons driving along the street, and held the case properly submitted to the jury. The court said:

“Appellee was upon the right-hand track. He could not proceed further upon that track because of the repair wagon. He could not turn to the right because the appellant had so incumbered that portion of the street with snow that he could not pass with his load on that side of the repair wagon. There was but one way for him to pass the repair wagon, and that was to turn to the left onto the west track, which he did. The grip car approaching upon that track was 300 or 400 feet distant on the top of the viaduct. The tracks at that point were straight and there was nothing to obstruct the view of the gripman. Appellee had a right to suppose that the gripman would exercise ordinary care under all the circumstances. The evidence would

July 1920]

Opinion Per MACKINTOSH, J.

justify a conclusion by the jury that the gripman did not apply the brakes until he was within a short distance of the appellee. If he did not, that certainly was negligence. If he failed to see the high repair wagon and try to prevent any injury to appellee, that was negligence. The gripman must have known that the snow pushed to the side of the tracks obstructed the passage by loaded wagons. He was bound to exercise what would be reasonable care, taking into account all the facts and circumstances as they then existed, and were apparent to him. The jury must have concluded that he did not. At any rate, they would be justified, under the testimony in this case, in so finding. The rights of the street railway company and of the private citizen in the public highways are, in law, mutual. Their duties and obligations are reciprocal. Neither had the right, unreasonably or unnecessarily, to obstruct or interfere with the use of the street by the other in a proper manner. And when a street car company has obstructed that portion of the street outside of its tracks, by snow pushed from that part of the street upon which its tracks are laid, and has obstructed one of its tracks with a repair wagon, so that there remains only the other track upon which a citizen may drive, it is incumbent upon the employes of the car company to be more watchful and cautious to prevent accidents than if the whole street was unobstructed and open to the use of persons driving along such street."

The court was, therefore, correct in submitting the case to the jury.

Appellant bases another claim of error on the admission of testimony that a motorman, seeing an obstacle on the track one hundred and fifty or two hundred feet away, could stop his car before hitting the object. Although the primary negligence relied on was the leaving of appellant's car upon the spur track, the entire conduct of the appellant was subject to examination, and the question of what was negligence on the part of the appellant is to be determined by all of the

circumstances of the case, and it was properly permitted to the respondent to show in what manner the west-bound car was being operated, as the appellant's negligence might have been the failure of the motor-man to promptly stop his car, in view of the situation as to the standing car.

The statement also answers the other assignment of error complained of, that the court admitted evidence of the alleged excessive speed of the west-bound car. It is true that the complaint did not allege excessive speed, but merely that the speed of appellant's west-bound car contributed to the injury, and the evidence merely went to the extent of showing that it was "coming pretty fast." The respondent was entitled to a proper performance of duty by the street car operators and had a right to assume that any street car would approach the crossing, with its obstruction, at a reasonable rate of speed. What was a reasonable rate of speed depends on the surrounding circumstances. *Atherton v. Tacoma etc. Co.*, 30 Wash. 395, 71 Pac. 39, indicates the principle to be that "safety in the speed is relative, and depends on the facts of the case, and, where they are disputed, it must be submitted to the jury." Under the allegation that the speed of the west-bound car contributed to the injury, the respondent had a right to produce testimony as to the car's actual speed, and from it the jury might determine whether the appellant was negligent in that regard in approaching the blocked street intersection.

Finding no error in the record, the judgment is affirmed.

HOLCOMB, C. J., TOLMAN, MAIN, and MITCHELL, JJ., concur.

July 1920]

Statement of Case.

[No. 15888. Department Two. July 26, 1920.]

MARY A. CARTWRIGHT, *Formerly Mary A. Thompson,*
et al., Appellants, v. WILLIAM HAMILTON
*et al., Respondents.*¹

BOUNDARIES (13) — LOCATION OF LINE — EVIDENCE — SUFFICIENCY. In an action to establish a boundary line, the true line is not shown to have been marked by an old division fence for twenty years, where it appears that such fence was about thirty feet from the quarter line and was but a continuation of a fence on one side of a highway sixty feet wide, the center line of which was the quarter line, and was not originally built as a dividing line, the other land being unenclosed.

ADVERSE POSSESSION (13) — DIVISION FENCES — ACQUIESCENCE OF ADVERSE PARTY — APPEAL — REVIEW. In an action to establish a boundary line, whether the defendants acquiesced in or treated any part of their fence as marking the true dividing line between the lands for the statutory period, is to be determined by the time plaintiff enclosed the disputed tract using defendants' fence to form a boundary thereof, and the time the controversy arose.

ADVERSE POSSESSION (13)—ACQUIESCENCE OF ADVERSE PARTY—LIMITATIONS. Acquiescence of the adverse party not being a condition of the running of the statute of limitations, one in possession of an enclosed tract of land is entitled to claim adverse possession from the time the tract was first enclosed, down to the time the defendant actually set back the fence.

APPEAL (418)—REVIEW—FINDINGS. The findings of the trial court on conflicting evidence will not be disturbed on appeal where it is impossible to say that it preponderates against the conclusions of the trial court.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 4, 1919, upon findings in favor of the defendants, in an action to establish a boundary line, tried to the court. Affirmed.

Fred J. Cunningham, for appellants.

John L. Dirks, for respondents.

¹Reported in 191 Pac. 797.

FULLERTON, J.—The appellant Mary A. Cartwright owns the southwest quarter, and the respondents T. C. Hamilton and wife own the southeast quarter, of section thirty-two, in township twenty-three, north, of range forty-five, east of the Willamette Meridian. In March, 1919, the appellant, her husband joining with her as plaintiff, instituted an action in equity in the superior court of the county in which the lands lie, to establish the boundary line between the lands. In her complaint the appellant alleged that such boundary line had been marked by a fence for more than twenty years, up to and until some two years prior to the commencement of the action, when the same was unlawfully changed by the respondent T. C. Hamilton by erecting a new fence west of the original location at distances ranging from seventeen to thirty feet. She further alleged that the line of the old fence had been recognized and acquiesced in by respective owners as marking the boundary between the lands during the period of time mentioned, and that she and her predecessors in interest had been in the open, notorious and exclusive possession of such southwest quarter, and all of the land lying east of the same, if any, up to the fence, for more than twenty years, claiming the same adversely to all the world. That the respondent T. C. Hamilton had by his acts unlawfully ousted and ejected her from the land lying between the line of the old fence and the new fence erected by him, and had, since the erection of such fence, wrongfully and unlawfully withheld possession of the same from her. She further alleged that she and T. C. Hamilton, as adjoining proprietors of lands, could not agree as to the location of the true boundary line between the lands, and prayed that a boundary line between the lands be erected, established and properly marked; that com-

July 1920]

Opinion Per FULLERTON, J.

missioners be appointed for that purpose; that the land lying between the line of the old fence and the new fence be restored to her, and that she have such other and further relief as to the court may seem just.

The answer of the respondents admitted the ownership of the lands as alleged in the complaint, admitted that the parties were adjoining proprietors and could not agree upon the boundary line between the lands, and denied the other allegations of the complaint. The prayer of the answer was that the true and legal boundary line between the lands be adjudged and decreed by the court, and that the expense thereof be equitably apportioned between the parties.

After issue had been thus joined, the trial court appointed a deputy county surveyor as a commissioner to survey and mark the true boundary between the lands. This officer performed the service and made report of his survey to the court, filing therewith a plat and the field notes of the survey. This report shows that the commissioner began his survey on the south side of the section, where he found a galvanized iron pipe set in the ground to mark the corner, and which he found by measurements to be substantially equidistant from the established corners marking the southeast and southwest corners of the section. From this point he ran a right line to the quarter section corner on the north of the section, reporting that the newly erected fence substantially followed this line, and that the old fence, as nearly as he could ascertain its location, was, at the point of beginning, thirty-three feet east therefrom; at seven hundred and seventy-three feet, "on ridge," was twenty-nine and six-tenths feet east, and at eleven hundred and thirty feet, at the point of the intersection of the line with the Palouse highway, was twenty-eight and nine-tenths

feet east. From the point where the line left the highway named on the north, the fence dividing the lands of the parties was substantially upon the line run by the commissioner.

At the trial, following the report of the commissioner, it developed that the controversy between the parties was over the strip of land lying south of the Palouse highway and between the line of the old fence and the line as marked by the commissioner. There was no evidence seriously disputing the fact that the line as run by the commissioner marked the true dividing line; the appellant supporting her claim to the land by evidence tending to show that the old fence had been constructed as a line fence and that the line marked thereby had been acquiesced in, and that she had been in the adverse possession of the land lying west thereof for more than ten years, or more than the period of the statute of limitations. The trial court found against her on these contentions, and entered a decree to the effect that the true dividing line between the lands of the parties was the line as run by the commissioner, and that the appellant take nothing by her action in "virtue of her claim to any other boundary line running north and south between said properties upon the ground of adverse possession, use or acquiescence, or at all." It is from this judgment the present appeal is prosecuted.

The questions at issue as presented here are wholly questions of fact. On the question whether the old fence had been constructed as a line fence, the evidence, in our opinion, hardly leaves the matter in doubt. It appears that, at a time some thirty years or more prior to the trial of the cause, the county commissioners of the county in which the lands lie laid out a county road passing through the section of which the

July 1920]

Opinion Per FULLERTON, J.

lands of the respective parties form a part; that the road was sixty feet in width; that the center of the road followed the dividing line between these quarter sections from their common corner on the north in a southerly direction for approximately three-fourths of distance through the lands, from which point it passed southwesterly onto the quarter section now owned by the appellant, intersecting its south line some few rods west of the common corner on the south; that, when the respondent's predecessors in interest fenced the quarter section now owned by him, the fence was constructed on his side of this road from the north line down to the point where the road turned onto the appellant's land, and from thence in a straight line to the south boundary of the land. The reason why the fence when constructed did not follow the side of the road to the dividing line and continue from thence south on such line to the common corner, is stated by a witness as being due to an inadvertence on the part of the persons who constructed the fence. But, be this as may, the evidence as a whole makes it clear that the fence was constructed solely for the purpose of enclosing the quarter section now owned by respondents, not as a division line fence. In fact, when constructed it formed no part of the fence enclosing the appellant's lands; on her side of the road an independent fence was constructed, following the road for the entire distance through the land.

Whether the respondents acquiesced in or treated any part of their fence as marking the dividing line between the premises for the period of the statute of limitations, the evidence is not so clear. It appears that the county road, as originally laid out, left to the southeast thereof in the appellant's quarter section approximately three acres of land. The fences enclos-

ing the land, as originally constructed, left this tract open to the commons. Some years later, by agreement between the county commissioners and the appellant's predecessor in interest, the road was changed to a better grade, increasing the size of this tract to possibly twelve acres. Some time after the appellant purchased the quarter section, she enclosed this tract, using the fence of the respondent to form the east side of the enclosure. From this time on until the time the respondent set the fence back to the true line, the appellant made use of the entire enclosure, cultivating and raising crops on a part of it at times, and at times using it as pasture land. During this period there was no dispute between the parties as to the true line, or as to whether the fence was or was not on the true line. This dispute arose on the establishment of the Palouse highway, which varies from the original road and necessitated a new adjustment of the fences. Between the time the appellant began to make use of the fence and the time the controversy arose, the fence was kept in repair, seemingly at the mutual expense of the parties, and, during this period, it could well be found that the fence was recognized and acquiesced in as forming the boundary lines between the lands. The difficulty is in determining the time the appellant enclosed the tract. Her testimony is to the effect that it was more than ten years prior to the time any dispute arose over the boundary, while the respondent testifies that the time was less than that, saying that it was possibly seven or eight years. The supporting evidence, that is, the evidence of the disinterested witnesses, is also in conflict. These witnesses vary as much in their estimates of the times the land had been enclosed as do the principals, and we cannot say that there was any decided preponderance either way. Un-

July 1920]

Syllabus.

der these circumstances, following our general rule, we are constrained to adopt that version of the evidence adopted by the trial court.

The remaining question, whether the appellant has title by adverse possession, is determined by the time she remained in the exclusive possession of the land. This possession began when she first enclosed the tract, and, since acquiescence of the adverse party is not a condition of the running of the statute of limitations, she is entitled to claim her possession as being adverse from that time down to the time the respondent actually set back the fence. But here again the evidence is conflicting, and we are not able to say that it preponderates against the conclusion of the trial court.

These conclusions require an affirmance of the decree of the trial court, and an affirmance is ordered.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15843. Department Two. July 26, 1920.]

SWEN OLSON *et al.*, Respondents, v. W. H. S. CLARK
et al., Appellants.¹

MASTER AND SERVANT (172)—INJURY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—TRANSFER OF MOTOR AND DRIVER—LIABILITY OF HIRER. A person renting or leasing a vehicle and driver, agreeing to pay a certain amount per day therefor, is liable to third persons for injuries sustained by such vehicle due to the negligence of the driver.

SAME (183)—INJURY TO THIRD PERSONS—ACTIONS—INSTRUCTIONS. In an action for injuries sustained in a collision with a rented truck, the issue as to whether defendant rented the truck is properly submitted by instructions telling the jury that it was for them to determine whether defendant rented it for himself and assumed control of the work done by it.

¹Reported in 191 Pac. 810.

SAME (182-1) — INJURY TO THIRD PERSONS — ACTIONS — QUESTION FOR JURY. Upon an issue as to whether defendant rented a truck which collided with and injured plaintiffs, the question is for the jury, where the defendant did the hiring and gave directions as to the work, notwithstanding defendant's son testified that he instructed defendant to hire the truck for him upon his work, in which the defendant had no interest.

APPEAL (413)—REVIEW—VERDICT. A verdict upon conflicting evidence will not be disturbed on appeal where there is any competent evidence to sustain it.

Appeal from a judgment of the superior court for Lewis county, Card, J., entered December 12, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a collision with an auto truck. **Affirmed.**

Hayden, Langhorne & Metzger, for appellants.

C. A. Studebaker and *H. E. Donohoe*, for respondents.

HOLCOMB, C. J.—On June 28, 1918, plaintiff Olson and wife, while driving a horse and buggy along the county road near Winlock, were struck by an automobile truck owned by Fred Veness and A. C. Sheves and driven by one Smith. In this collision Mrs. Olson was severely injured, and the vehicle in which she and her husband were riding was damaged. The Olsons brought this action against defendants Clark, on the theory that defendants were hirers of the truck and that Smith, the driver, was their employee or servant. As to defendants Robert Clark and wife, a nonsuit was entered. Defendants W. H. S. Clark (called Henry Clark) and wife also moved for a nonsuit and for a directed verdict, both of which motions were denied. The jury returned a verdict in favor of plaintiffs, and from the judgment entered upon that verdict, defendants have appealed.

July 1920]

Opinion Per HOLCOMB, C. J.

For a further and more particular statement of the facts, reference is made to *Olson v. Veness*, 105 Wash. 599, 178 Pac. 822, that being an action arising from the same circumstances here involved.

Here the controlling question is: Were appellants the hirers of the truck and, as such, responsible for the negligence of the driver in causing the collision, resulting in the injuries of which respondents complain? While generally true, as urged by appellants, that the owner of an automobile is *prima facie* responsible for the negligence of the driver, that rule is not inexorable, as decided in *Olsen v. Veness*, *supra*.

Over the objection of appellants, the court gave the jury the following instruction:

"Members of the jury, it is the law that one who hires from another a vehicle and driver, and agrees to pay therefor a given amount per day, is responsible for any accident or injuries caused by such vehicle and driver, if due to the negligence and want of care of the driver, even though such driver might be paid by the owner of such vehicle. In other words, after the owner has turned such rented vehicle and driver over into the control of the person renting or leasing same, then such latter person stands in the same position with third persons as though he were the owner, and is liable to any third persons for all injuries caused by such vehicle, or truck, due to the negligence and want of care of the driver of same."

We think this instruction correctly stated the law as laid down in *Olsen v. Veness*, *supra*. That case came before us on an appeal from the action of the trial court in sustaining a motion of defendants Veness and Sheves for a nonsuit (respondents here being appellants in that case), and we said:

"To our minds, the question of control of operation is the determining factor in this case. The respondents [Veness and Sheves], in the course of business, had transferred the vehicle and driver to the control of the

hirer, who alone could say where and in what the work of the truck should thereafter consist, and if this effected a transfer of control it must, *ipso facto*, have effected a transfer of responsibility. If such be the fact, we feel that respondents' contention, that the hirer stood, in relation to the law of this case, as if he had purchased the truck and hired the driver, must logically follow."

Part of another instruction which the court gave the jury reads as follows:

"It is for you to decide whether or not the defendant W. H. S. Clark hired the truck which caused the accident if you find that the accident was caused by a truck, and whether he hired it for himself or for use in his business or for someone else, and further, whether or not by such contract of hiring he assumed control of the method of the performance of the work to be done by the truck. . . ."

This instruction clearly and correctly submitted to the jury the issue determinable by them. It was a pure question of fact upon which there was sharp conflict in the testimony.

The chief testimony on the proposition of who was the hirer and in control of the truck at the time of the injury was by the parties themselves. Some of it was testimony as to admissions and declarations on the part of Henry Clark at the trial of the former case and elsewhere.

Upon a motion for a directed verdict in behalf of appellants, the trial court, in disposing of the same, stated:

"There is a conflict on the facts; Mr. Olson's testimony against Mr. Clark's. Of course that question can go to the jury. The only question is this presumption as to responsibility, liability for operating the truck on the part of the owner. I consider that settled by this decision I have taken notice of. The decision holds that the owner of this particular truck is not

July 1920]

Opinion Per HOLCOMB, C. J.

liable and that the operator or hirer as it were [is], so that the case is sufficient to go to the jury. . . .”

The testimony shows that the son made no arrangements at all concerning the hiring, and had not seen his father for a week before the accident. It was the father, Henry Clark, who, on the evening before the accident, gave the driver Smith directions when and where to go and what road to take; and it was while the driver was following such directions that the accident occurred. The contract in writing, which was lost, if signed at all by either Clark, was signed by Henry Clark, ostensibly as principal; and he kept it himself until it was lost. While the son, Robert Clark, did testify that it was his work that the truck was hired for, that he instructed his father to rent the truck for him, and that his father had no interest whatsoever in his [Robert Clark's] contract or the business being conducted by him, the jury was not bound to believe his evidence. Under this state of the facts, the trial court properly submitted the case to the jury, and in doing so properly gave the instructions heretofore quoted, and there was no error in refusing to give the instructions requested by appellants.

We are not inclined to depart from the rule we have so often announced and uniformly followed, which is that a verdict upon conflicting evidence, where there is any competent testimony to sustain the verdict, will not be disturbed upon appeal.

There are other assignments of error, including alleged misconduct of counsel for respondents in argument to the jury. They have all been carefully examined and are found to be without sufficient merit to warrant discussion.

The judgment is affirmed.

BRIDGES, FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15945. Department One. June 25, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. F. A. BROWN *et al.*,
Appellants.¹

Motion to dismiss an appeal from a judgment of the superior court for Benton county, Truax, J., entered February 7, 1920. Denied.

Ralph S. Pierce, for appellants.

G. W. Hamilton, for respondent.

PER CURIAM.—This is a motion to dismiss the appeal because the appellants have not served and filed a brief within the time limited by law, or at all. The same excuse for failure to file the brief in this case is made as in the case of *State v. Terrien*, ante p. 345, 190 Pac. 1017. Upon the authority of that case, the motion to dismiss the appeal will be denied, and the appellants be given until August 1, 1920, to perfect their appeal in this court.

[No. 15926. Department One. June 25, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. FRED SUTTLE, *Appellant*.¹

Motion to dismiss an appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered January 29, 1920. Denied.

Arthur McGuire, *C. R. Hadley*, and *E. K. Brown*, for respondent.

PER CURIAM.—This is a motion to dismiss the appeal, and presents the same questions as the case of *State v. Terrien*, ante p. 345, 190 Pac. 1017. Upon the authority of that case, the appellant will be given until August 1, 1920, to perfect his appeal in this court.

¹Reported in 190 Pac. 1018.

July 1920]

Opinion Per BRIDGES, J.

[No. 15822. Department Two. July 7, 1920.]

C. R. STOLZE *et al.*, *Appellants*, v. IDA M. STOLZE *et al.*, *Respondents*.¹

Appeal from an order of the superior court for Pierce county, Card, J., entered February 11, 1920, denying a motion to vacate a judgment, after a hearing before the court. Reversed.

Guy E. Kelly and *Thomas McMahon*, for appellants.

P. L. Pendleton, for respondents.

BRIDGES, J.—Sometime prior to April 23, 1919, the respondent, Ida M. Stolze, instituted suit in the superior court of Pierce county, Washington, against the appellants here and defendant North Pacific Bank. None of the defendants in that case appeared except the North Pacific Bank. While the complaint in that action is not before us, it may be gleaned, however, from the record that Ida M. Stolze and C. R. Stolze were husband and wife, and Florence Stolze (now by marriage Florence Burns), was the daughter of C. R. Stolze by a former marriage; that the plaintiff, Ida M. Stolze, sought judgment against her husband for separate maintenance and support; that, prior to the commencement of the suit, the plaintiff and her husband had entered into three written contracts for the sale of certain real property, which contracts were placed in escrow with the defendant bank, which was to collect the various deferred payments, and that, at the same time, deeds were made and deposited in escrow with the bank to be delivered to the purchasers when full payment had been made, and that thereafter C. R. Stolze assigned these contracts to his daughter, Florence Burns, nee Stolze, and authorized her to collect from the bank any and all payments thereafter made upon them. On April 23, 1919, judgment by default was entered in that cause in favor of the plaintiff therein, Ida M. Stolze, wherein she was awarded separate maintenance and support, and which cancelled the assignments of the contracts made by C. R. Stolze to his daughter Florence; and adjudged that the plaintiff, Ida M. Stolze, and her husband, C. R. Stolze, were the owners and entitled to receive the payments to be made on account of such contracts, and it directed the bank to transfer such accounts on its books and place the same to the credit of C. R. Stolze and wife, the plaintiff herein. The plaintiff was also given a judgment against her husband in the sum of \$366.50. It further provided that the bank should deliver the contracts of sale and escrow deeds to the plaintiff, Ida M. Stolze.

After the entry of such judgment and during the month of August, 1919, C. R. Stolze and his daughter, Florence Burns, insti-

¹Reported in 191 Pac. 644.

tuted this action against Ida M. Stolze and the North Pacific Bank, for the purpose of setting aside the judgment above mentioned in favor of Ida M. Stolze. The petition for vacation, while mentioning jurisdictional grounds, was mainly rested upon the merits of the case and presented excuses for not appearing in the action and defending the same. The respondent was duly brought into the action, but the record does not disclose whether service of summons or notice was made on the defendant North Pacific Bank. At any rate, that bank did not appear in the action. Later, Ida M. Stolze appeared and answered the petition to vacate. Still later, she demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action or to justify any relief, and at the same time she moved the court to be permitted to withdraw her answer for the purpose of interposing the demurrer. The record does not disclose any disposition of either the motion or the demurrer. Thereafter the matter came on for trial before the court and testimony was taken and the court, on the 11th of February, 1920, entered an order denying the motion to vacate the judgment. From this order the petitioners, C. R. Stolze and Florence Burns, have appealed.

This is a companion case with the case of *Burns v. Stolze*, ante p. 392, 191 Pac. 642, and the entire proceeding in this case is substantially the same as in the foregoing case. The affidavit for publication of summons contains the same defects; the petition for the vacation of the judgment, and the answer and demurrer to the petition are substantially the same as in the previous case, and this case was rested for the most part upon the testimony taken in that case. What is said in *Burns v. Stolze*, *supra*, is applicable to the facts and circumstances of this case, and the disposition of that case must control the disposition of this one. There we held that the court should have vacated the default judgment. We hold here that the default judgment in this case, in so far as it affects these appellants, should have been vacated and set aside.

The judgment is reversed, and the cause remanded with directions to the lower court to make and enter an order vacating and setting aside the judgment in the original case, in so far as it affects the appellants here.

FULLERTON, MOUNT, and TOLMAN, JJ., concur.

July 1920]

Opinion Per MACKINTOSH, J.

[No. 15821. Department Two. July 7, 1920.]

IDA M. STOLZE, *Respondent*, v. C. R. STOLZE *et al.*, *Appellants*.¹

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 2, 1920, denying a motion to vacate a judgment. Affirmed.

Guy E. Kelly and *Thomas McMahon*, for appellants.

P. L. Pendleton, for respondent.

PER CURIAM.—The facts and questions of law involved in this appeal are substantially the same as those involved in the case of *Stolze v. Stolze*, *ante* p. 398, 191 Pac. 641 (Serial No. 15819). What we said in that case is applicable to this and the disposition of that case must control the disposition of this. For the reasons given in that case, the judgment here appealed from is affirmed.

[No. 15721. Department One. July 9, 1920.]

ELLA DOROTHY HEBDEN, *Respondent*, v. BERNARD SYDNEY HEBDEN, *Appellant*.²

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered July 17, 1919, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

Del Cary Smith and *A. O. Colburn*, for appellant.

Roy A. Redfield, for respondent.

MACKINTOSH, J.—A divorce was granted respondent upon her complaint charging the appellant with cruelty, she was awarded the custody of their three children of tender years, and a division was made of the community property. From all of this decree, the appellant has come to this court, alleging many errors in the trial.

As we view the testimony, taken in the course of a long and acrimonious hearing, we feel that a summary of it in this opinion would neither add anything to the body of our law or assist in making smooth the rough places in the future lives of those most intimately concerned in this unhappy domestic catastrophe. The record affords ample material for the critical analysis of a modern novelist, but, aside from that, we can see no reason for perpetuating the sordid story in the already congested annals of the law. Suffice it to say, that a careful review of the testimony and a consideration

¹Reported in 191 Pac. 641.

²Reported in 191 Pac. 391.

of the many objections thereto, convinces us that the cruelty alleged was satisfactorily proven; that the appellant unremittingly heaped Ossa upon Pelion, until the foundations of conjugal felicity crumbled; or, perhaps, better, it might be said that the dark waters of his morose and sullen disposition, dropping unceasingly, had at last worn away the rock of marital tolerance.

There is nothing in the record to justify interference with the decree as to the custody of the children, whose welfare is unquestionably best served by awarding them to the care of their mother, nor does the distribution of the property of the parties appear to be otherwise than fair and just. This opinion may be well closed by quoting from the case of *Quient v. Quient*, 105 Wash. 315, 177 Pac. 779:

"It is first contended that the evidence does not sustain the findings of the trial court. It is probably true that the evidence fails to disclose any one act of shortcoming on the part of the husband which in itself would be sufficient to justify the divorce. But when the record is read in its entirety it discloses a course of conduct on the part of the husband, beginning early in the married life of the parties, which was humiliating and distressing to the wife, and which was prompted by his imperious and domineering disposition and utter lack of affectionate regard for his wife and her rights as a party to the union. It is unnecessary here to set out this distressing story, but it is sufficient to say that a careful consideration of the evidence leads us to the conclusion that the trial court properly entered a judgment dissolving the bonds between the parties."

Judgment affirmed.

HOLCOMB, C. J., MAIN, and PARKER, JJ., concur.

INDEX

Abandonment:

- Title to abandoned river channel, see **NAVIGABLE WATERS**.
- Of cause of action by amendment, see **PLEADING**, 6.

Abatement and Revival:

- Failure to serve process as affecting commencement of new action, see **ACTION**, 2, 3.
- Abatement by failure to prosecute action, see **DISMISSAL AND NON-SUIT**.

Abutting Owners:

- Assessments for expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 4-8.

Acceptance:

- Of reduced verdict as estoppel to allege error, see **APPEAL AND ERROR**, 9.
- Of goods sold, in general, see **SALES**, 6.

Accident:

- Injuries to servant or third person, see **MASTER AND SERVANT**.
- To person on city street, see **MUNICIPAL CORPORATIONS**, 11-17.

Account:

- Action on open account, see **ACCOUNT, ACTION ON**.
- Amendment of complaint regarded as made, see **APPEAL AND ERROR**, 12.
- Accounting by assignee for benefit of creditors, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**.
- Accounting for partnership profits, see **PARTNERSHIP**.
- 1. **ACCOUNT (10)—ACTIONS FOR—DEMAND.** A demand for the return of goods after all debts had been paid by the assignee is a sufficient demand to support an action against the assignee for an accounting. *Kriegler v. Spokane Merchants' Ass'n*..... 179

Account, Action on:

1. **ACCOUNT, ACTION ON (3)—EVIDENCE.** The statement of an account by a government field officer who was keeping the account by agreement as agent for both parties is prima facie evidence, as between the parties, of the correctness of the account, although he was not sworn as to its correctness. *Hurley-Mason Co. v. Pacific Commissary Co.* 439

Account, Action on—Continued.

2. **SAME.** The statement of an account by an auditor acting for both parties, showing items of merchandise not paid for, is not impeached by the evidence of an officer of one of the companies that all items of merchandise taken from the commissary and applied to its private use had been paid for, where information as to the state of the account was derived wholly from the auditor, and it could not be known that the payments were in full. *Hurley-Mason Co. v. Pacific Commissary Co.*..... 439

Account Stated:

Duplicity of complaint in action on, see **PLEADING**, 2.

Accrual:

Of action for wrongful death, see **DEATH**, 2.

Acquiescence:

In error, see **APPEAL AND ERROR**, 9, 10.

Action:

See **BILLS AND NOTES**.

To compel rendition of account, see **ACCOUNT**.

For damage to crops by trespassing animals, see **ANIMALS**.

Stay of proceedings, see **APPEAL AND ERROR**, 4.

By persons engaged in war duties, see **ARMY AND NAVY**.

Assignment of right of action, see **ASSIGNMENTS**.

By assignor against assignee for accounting, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 1.

Bailor and bailee, see **BAILMENT**.

Establishment of boundaries, see **BOUNDARIES**.

On contracts, see **CONTRACTS**.

By or against corporations, see **CORPORATIONS**.

On contractor's bond, see **COUNTIES**, 1.

Filing claim against county as condition precedent, see **COUNTIES**, 3, 4.

For wrongful death, see **DEATH**.

Dismissal for failure to prosecute, see **DISMISSAL AND NONSUIT**.

Election of remedy, see **ELECTION OF REMEDIES**.

Condemnation of property for public use, see **EMINENT DOMAIN**.

Rescission of contract for exchange of property, see **EXCHANGE OF PROPERTY**.

Setting aside sale, see **EXECUTION**, 1.

By or against executors and administrators, see **EXECUTORS AND ADMINISTRATORS**.

For fraud, see **FRAUD**.

By or against husband or wife, see **HUSBAND AND WIFE**.

On insurance policy, see **INSURANCE**.

Action—Continued.

- For accounting, see **JOINT ADVENTURES**.
- Cancellation of judgment, see **JUDGMENT**, 1, 2.
- Injuries for negligence of landlord, see **LANDLORD AND TENANT**, 2.
- Limitation by statute, see **LIMITATION OF ACTIONS**.
- Malicious actions, see **MALICIOUS PROSECUTION**.
- Injuries to third person by employee, see **MASTER AND SERVANT**.
- Foreclosure of mortgage, see **MORTGAGES**, 5-8.
- For injuries from automobile in streets, see **MUNICIPAL CORPORATIONS**, 11-17.
- For loss of property by fire, see **NEGLIGENCE**.
- For accounting for profits, see **PARTNERSHIP**.
- Pleadings in, see **PLEADING**.
- Rescission of sale of personal property, see **SALES**, 2-5.
- Pleading cause of action on other and distinct transaction, see **SET-OFF AND COUNTERCLAIM**.
- Against street railroads for personal injuries, see **STREET RAILROADS**.
- For conversion of property, see **TROVER AND CONVERSION**.
- For value of services, see **WORK AND LABOR**.

1. **ACTIONS (17)—CHANGE OF CHARACTER OR FORM.** Where there had been no service of process and the defendant had not appeared in an action for separate maintenance, the court, upon allowing an amendment to change the action to one for divorce, is within its powers in permitting the change and ordering that the complaint may be deemed refiled as of a later date to give the court jurisdiction of the action for divorce. *Schwarzmilller v. Schwarzmilller* 672
2. **ACTIONS (31)—COMMENCEMENT OF ACTION—PROCEEDINGS CONSTITUTING—SERVICE OF PROCESS.** The failure of a party to make personal service or commence service by publication within ninety days from the date of filing the complaint, as required by Rem. Code, § 220, does not lose plaintiff his cause of action or right to serve a complaint and summons at a subsequent time, upon the court's order allowing the complaint to be refiled. *Schwarzmilller v. Schwarzmilller* 672
3. **ACTIONS (31)—COMMENCEMENT—SERVICE OF SUMMONS WITHOUT FILING COMPLAINT—STATUTES.** Failure to serve a summons within 90 days after filing the complaint, as provided by Rem. Code, § 321, does not lose the cause of action; and service of a summons thereafter is the commencement of a new action dating from the day of service. *Burns v. Stolze*..... 392

Adequate Remedy at Law:

- Remedy by appeal as bar to mandamus, see **MANDAMUS**.

Adjoining Landowners:

- Location of boundary line, see **BOUNDARIES**.

Administration:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS.

Admissions:

As evidence in civil actions, see EVIDENCE, 2.

Amendment of answer to withdraw admission, see PLEADING, 8.

Adverse Possession:

1. ADVERSE POSSESSION (13)—ACQUIESCENCE OF ADVERSE PARTY—LIMITATIONS. Acquiescence of the adverse party not being a condition of the running of the statute of limitations, one in possession of an enclosed tract of land is entitled to claim adverse possession from the time the tract was first enclosed, down to the time the defendant actually set back the fence. *Cartwright v. Hamilton*.. 685
2. ADVERSE POSSESSION (13) — DIVISION FENCES — ACQUIESCENCE OF ADVERSE PARTY — APPEAL — REVIEW. In an action to establish a boundary line, whether the defendants acquiesced in or treated any part of their fence as marking the true dividing line between the lands for the statutory period, is to be determined by the time plaintiff enclosed the disputed tract using defendants' fence to form a boundary thereof, and the time the controversy arose. *Cartwright v. Hamilton*..... 685
3. ADVERSE POSSESSION (37)—PLEADING—POSSESSION. An allegation in a complaint to quiet title that the plaintiffs and their grantors have been in adverse possession for more than the statutory period, is insufficient to show that the possession of one of the grantors was adverse to that of another grantor through whom defendant claimed. *Raoulings v. Heal*..... 218

Affidavits:

Failure of sheriff to sign affidavit of publication of notice of sale, see MORTGAGES, 6.

For service of publication, see PROCESS, 2, 3.

Agency:

See PRINCIPAL AND AGENT.

Agreement:

See CONTRACTS.

Agriculture:

1. AGRICULTURE (1)—STATES (23-1) — COLLECTION AND CUSTODY OF FUNDS. Rem. Code, § 5029, requiring each state officer collecting money to transmit the same to the state treasurer each day, did not repeal the prior special act, § 3009, providing that on the last Monday of October of each year, the state fair commissioners shall remit all moneys remaining in their hands, in view of the impossibility of

Agriculture—Continued.

conducting the state fair as a going concern without the application of receipts to the revolving fund provided for by the act. *State ex rel. Sherman v. Benson*..... 124

2. AGRICULTURE (3) — BOARDS AND OFFICERS — POWERS — STATUTES. Under the act of 1893, Rem. Code, § 3004, defining the powers of the state fair commission, and the act of 1913, Rem. Code, § 3000-6, providing that the commissioner of agriculture shall exercise all the powers vested in the state fair commission, the earlier special act was not impliedly repealed by the later general enactment, which transfers the control exactly as it was under the original act. *State ex rel. Sherman v. Benson*..... 124

Alien Enemies:

Limitation on right of action during period of war, see WAR.

Allowance:

To surviving wife, see EXECUTORS AND ADMINISTRATORS, 2.

Alteration:

Of boundaries, see SCHOOLS AND SCHOOL DISTRICTS.

Ambiguity:

Evidence to explain, see WILLS, 3.

Amendment:

To change form of action, see ACTION, 1.

On appeal or writ or error, see APPEAL AND ERROR, 12, 13.

Of pleading, see PLEADING, 4-8.

Animals:

1. ANIMALS (18) — DAMAGE TO CROPS—EVIDENCE—SUFFICIENCY. A verdict for \$75 for damages to a wheat crop by trespassing hogs is not unsupported, where there was conflicting evidence as to whether the crop was of any value for harvesting, and there was a counter-claim for hogs taken up and converted. *Knecht v. Sims*..... 419

Annexation:

Of personalty to real property, see FIXTURES.

Answer:

In pleading, amendment of, see PLEADING, 8.

Apartment Houses:

Building regulations, see MUNICIPAL CORPORATIONS, 9, 10.

Appeal and Error:

Costs on appeal, see COSTS.

Criminal appeals, see CRIMINAL LAW, 1, 8-10.

Appeal and Error—Continued.

Remedy by appeal or writ of error as barring mandamus, see **MANDAMUS**.

III. DECISIONS REVIEWABLE.

1. **APPEAL (72) — DECISIONS REVIEWABLE — PART OF JUDGMENT.** A plaintiff may appeal from the part of a judgment adverse to her, under Rem. Code, § 1719, notwithstanding the case is triable *de novo* on appeal. *Kriegler v. Spokane Merchants' Ass'n*..... 179

IV. RIGHT TO APPEAL.

2. **APPEAL (102)—DECISIONS REVIEWABLE — CESSATION OF CONTROVERSY—LAPSE OF TIME.** An appeal from an order refusing a writ of assistance to put a mortgagee in possession during the period of redemption will be dismissed, where before the hearing, the period of redemption had expired and any decision would be academic and without effect upon any controversy between the parties. *Holly-Mason Hardware Co. v. Schnatterly*..... 29

V. PRESERVATION OF GROUNDS.

Necessity of objections for purpose of review, see **CERTIORARI**.

3. **APPEAL (145) — EXCEPTIONS TO FINDINGS — NECESSITY IN EQUITABLE ACTION.** The failure to except to findings prevents inquiry as to the sufficiency of the evidence even in an equity case. *Shelton v. Powers* 302

IX. SUPERSEDEAS.

4. **APPEAL (232, 236)—SUPERSEDEAS OR STAY—RIGHT TO—DEFICIENCY JUDGMENT.** Upon appeal from a deficiency judgment in foreclosure in a certain amount, appellant is not entitled to a stay of execution pending the appeal, in the absence of a stay bond under Rem. Code, § 1722, requiring a bond in double the amount of the judgment appealed from. *Osner & Mehlhorn, Incorporated, v. Loewe*..... 550

X. RECORD.

5. **APPEAL (288) — RECORD—STATEMENT OF FACTS—EXTENSION OF TIME—DISMISSAL.** The filing of a statement of facts or bill of exceptions within the statutory period is jurisdictional, and thereafter the time cannot be extended; but this does not prevent the review of errors that arise upon the record aside from the statement or bill. *State v. Terrien*..... 345
6. **SAME (329, 338)—TRANSCRIPT AND BRIEFS—SERVICE AND FILING—EXCUSE FOR DELAY.** The failure to file a transcript and briefs within time is not jurisdictional, and the time may thereafter be extended for good cause, in the discretion of the court. *State v. Terrien* 345

Appeal and Error—Continued.

XI. BRIEFS.

7. **APPEAL (338)—BRIEFS—TIME FOR SERVICE.** A motion to strike respondent's brief, because filed out of time, will be denied when it was filed before the motion was made, and in time for service of a reply brief before the hearing. *Lovejoy v. Americus*..... 571

XVI. REVIEW.

8. **APPEAL (375)—REVIEW—MATTERS NOT BEFORE TRIAL COURT.** A jurisdictional objection to the validity of a judgment may be raised at any time, and will be decided by the supreme court although not pressed to the attention of the trial court. *Burns v. Stolze*. 392
9. **APPEAL (386)—REVIEW—ESTOPPEL TO ALLEGE ERROR—ACCEPTING REDUCED VERDICT.** Plaintiff having accepted a remission in the amount of a verdict to avoid a new trial, cannot, on defendant's appeal, urge that the judgment be in the amount of the original verdict. *McElrath v. Fall*..... 438
10. **APPEAL AND ERROR (386)—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR—ACQUIESCENCE OR WAIVER.** If defendant puts in evidence after refusal of a nonsuit, the plaintiff is entitled to receive any and all benefits therefrom. *Olsen v. Peerless Laundry*..... 660
11. **APPEAL (388)—REVIEW—QUESTIONS RAISED BY RESPONDENT.** On appeal by plaintiff from a judgment of dismissal on challenge to the sufficiency of the evidence, error assigned by defendant in overruling a demurrer to the answer cannot be reviewed. *Pioneer Mining & Ditch Co. v. Davidson*..... 262
12. **APPEAL (389)—REVIEW—AMENDMENTS REGARDED AS MADE.** In an action tried *de novo* on appeal, the supreme court must regard a complaint upon an account stated to have been amended to conform to proofs showing plaintiff entitled to recover upon another ground without reference to the account. *Hurley-Mason Co. v. Pacific Com-missary Co.* 439
13. **APPEAL (398)—REVIEW—PLEADING—AMENDMENT.** A defect in a complaint in asking condemnation for only part of a ditch will be considered amended on appeal to make it as broad as the evidence showing a necessity for condemning the entire ditch. *State ex rel. Lincoln v. Superior Court*..... 615
14. **APPEAL (406) — REVIEW — DISCRETION—NEW TRIAL.** After two jury trials, in which a particular issue was emphasized and twice decided the same way, it is not an abuse of discretion to refuse a new trial for insufficiency of the evidence, however strongly the verdict appears to be contrary to the evidence. *Henrickson v. Smith* 82

Appeal and Error—Continued.

15. **APPEAL (413) — REVIEW — VERDICT.** A verdict upon conflicting evidence will not be disturbed on appeal where there is any competent evidence to sustain it. *Olson v. Clark*..... 691
16. **APPEAL (416) — REVIEW — FINDINGS.** Findings upon conflicting evidence in an equity case will not be disturbed on appeal unless it can be said that the evidence preponderates against them. *George v. Pierce County*..... 495
17. **APPEAL (418)—REVIEW—FINDINGS.** Where there is a direct conflict in the evidence, findings supported by sufficient evidence will not be disturbed on appeal. *Ames v. Duff and Youk*..... 259
18. **APPEAL (418) — REVIEW — FINDINGS.** Findings upon conflicting evidence will not be disturbed unless against the preponderance of the evidence. *Di Luck v. Bradner Company Inc.*..... 291
19. **APPEAL (418) — REVIEW — FINDINGS.** The findings of the trial court on conflicting evidence will not be disturbed on appeal where it is impossible to say that it preponderates against the conclusions of the trial court. *Cartwright v. Hamilton*..... 685
20. **APPEAL AND ERROR (421)—REVIEW—CONCLUSIONS OF LAW.** A finding upon undisputed facts, that a bank received a draft for collection and did not become the owner, is a conclusion only, and not binding upon the supreme court upon appeal. *Vickers v. Machinery Warehouse & Sales Co.*..... 576
21. **APPEAL (451) — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE.** The admission of improper evidence is harmless, in an action tried before the court without a jury, and triable *de novo* on appeal. *McVeety v. Hayes*..... 457
22. **APPEAL (452)—HARMLESS ERROR—ADMISSION OF EVIDENCE—TRIAL DE NOVO.** On appeal from an action for an accounting, triable *de novo*, errors in the admission of evidence are immaterial. *Kriegler v. Spokane Merchants' Ass'n.*..... 179
23. **APPEAL (467) — HARMLESS ERROR—VERDICTS.** Irregularity in a verdict against two joint tort feasons for \$7,500 in attempting to segregate the damages and assess half against each, is cured by plaintiff's remission and reduction of the verdict to the sum of \$3,000. *Pearson v. Arlington Dock Co.*..... 14
24. **APPEAL (469)—REVIEW—HARMLESS ERROR—JUDGMENT OR ORDER—TENDER.** In an action upon a guaranty of payment of the purchase price of land sold, defendant cannot complain that plaintiff did not tender a deed of the land conveyed to him, where the judgment recites that, upon its payment, the plaintiff shall convey the property to the defendant, as he is not prejudiced. *Hardinger v. Hainsworth* 590

Appeal and Error—Continued.**XVII. DETERMINATION AND DISPOSITION OF CAUSE.**

25. **APPEAL (487)—DECISION—MATTERS DETERMINED—SEGREGATION OF DAMAGES.** Where the jury segregated the damages on different causes of action, error as to one will not cause a reversal as to the other, and a new trial will be confined to the one reversed. *Florence Fish Co. v. Everett Packing Co.*..... 1
26. **APPEAL (488)—DECISION—REMAND FOR FURTHER ACTION.** Upon reversing a judgment for defendant, notwithstanding the verdict of a jury for the plaintiff, judgment will not be entered on the verdict when the trial court did not dispose of defendant's motion for a new trial. *Casey v. Williams*..... 348

Appearance:

Necessity on appeal to obtain costs, see **COSTS**.

1. **APPEARANCE (5)—SPECIAL APPEARANCE—MOTION TO QUASH SERVICE OF SUMMONS—JURISDICTION ACQUIRED.** A special appearance to quash service of summons for want of jurisdiction of the person of the defendant, raising questions of fact as to whether defendant was doing business in this state or had an agent herein upon whom process could be served, submits to the jurisdiction of the court for the purpose of deciding all questions of law and fact necessary to dispose of the motion. *State ex rel. Rothwell & Co. v. Superior Court* 63

Application:

Of deposits to debts due bank, see **BANKS AND BANKING**, 4-6.

For change of venue in civil actions, see **VENUE**.

Appointment:

Of receiver for solvent corporation, see **CORPORATIONS**, 4, 5.

Of receiver, effect upon liens, see **RECEIVERS**.

Apportionment:

Of damages to persons entitled, see **DEATH**, 1.

Appropriation:

Taking property for public use, see **EMINENT DOMAIN**.

Architects:

Recovery for value of services, see **WORK AND LABOR**.

Army and Navy:

1. **ARMY AND NAVY—ACTIONS—PROSECUTION—SOLDIERS CIVIL RELIEF.** A sea captain engaged in carrying munitions of war and transporting soldiers during the late war, is not within a service covered by the Soldiers and Sailors Civil Relief Act (U. S. Comp. St. Ann. Sup.

Army and Navy—Continued.

1919, §§ 3078½a *et seq.*; nor could he ask a continuance of a civil action upon a showing of fact not made in the manner required by the act. *Greenwood v. Puget Mill Co.*..... 464

Assessment:

For public improvements, see MUNICIPAL CORPORATIONS, 4-8.

Of tax, see TAXATION, 1.

Assets:

Of insolvent bank, see BANKS AND BANKING, 1, 10.

Assignments:

Action against assignee, see ACCOUNT.

Of contract for purchase of land, right to refund of purchase price, see VENDOR AND PURCHASER, 2, 3.

1. ASSIGNMENT (2) — THINGS ASSIGNABLE—RIGHT OF CONTRIBUTION. A right of action for contribution in favor of one guarantor against another is assignable. *Pioneer Mining & Ditch Co. v. Davidson* 262
2. SAME (5) — THINGS ASSIGNABLE—PERSONAL NATURE—RIGHT TO CONTRIBUTION. The right to contribution being based upon the principle that equality is equity, is not defeated on the theory that the guaranty was personal and could not be so assigned as to confer upon an assignee the right to contribution. *Pioneer Mining & Ditch Co. v. Davidson*..... 262
3. ASSIGNMENTS (13)—IN WRITING—REQUISITES—NAMING DEBTOR—STATUTES. Rem. Code, § 191, providing that any assignee of a specialty or other chose in action for the payment of money, by assignment in writing, may maintain an action thereon in his own name, against the obligors or debtors therein named, does not require that the assignment name the obligor or debtor to be sued; the reference being to debtors named in the obligation assigned. *Pioneer Mining & Ditch Co. v. Davidson*..... 262
4. SAME (20)—INTEREST TRANSFERRED—CHOSE IN ACTION. A chose in action passes by a general assignment by one mining company to another of all its personal property, and includes a right of contribution by a joint guarantor's payment of a common debt. *Pioneer Mining & Ditch Co. v. Davidson*..... 262

Assignments for Benefit of Creditors:

By insolvent corporation, see CORPORATIONS, 3.

1. ASSIGNMENT FOR CREDITORS (24)—ACTIONS BY ASSIGNEE. An assignor for the benefit of creditors who was the owner of stock assigned, may bring an action in her own name against the assignee for an accounting for waste and breach of trust. *Kriegler v. Spokane Merchants' Ass'n.*..... 179

Assignment for Benefit of Creditors—Continued.

2. **ASSIGNMENT FOR CREDITORS (37)—LIABILITY FOR LOSSES—NEGLIGENT SALE OF PROPERTY.** An assignee for the benefit of creditors who, without notice to anyone, accepted an offer and sold property for \$5,000, when it was inventoried for \$17,000 and could have been sold on any reasonable notice for \$10,000, is guilty of negligence rendering himself liable for the loss. *Kriegler v. Spokane Merchants' Ass'n*..... 179
3. **ASSIGNMENT FOR CREDITORS (37)—ACCOUNTING—CHARGES—CLAIMS CONSENTED TO.** An assignor for the benefit of creditors who consented that a claim against her husband's estate be paid out of the funds cannot, in an action for accounting, charge the payment against the assignee, even if the probate court was without jurisdiction to make the order for the payment. *Kriegler v. Spokane Merchants' Ass'n* 179
4. **SAME (37)—ACCOUNTING—ATTORNEY'S FEES.** Under an assignment for the benefit of creditors in which the assignee agreed to sell the property and pay debts, retaining a commission of five per cent, he is not entitled to any allowance for attorney's fees. *Kriegler v. Spokane Merchants' Ass'n*..... 179

Associations:

- Clearing house associations, see **BANKS AND BANKING**, 7-13.
- Fraternal benefit insurance associations, see **INSURANCE**, 3, 6, 8, 9.

Assumption:

- Of debt by third person, see **GUARANTY**.
- Of mortgage by purchaser of property mortgaged, see **MORTGAGES**, 4.
- By city of deficiency on failure of special improvement fund, see **MUNICIPAL CORPORATIONS**, 5-8.

Attorney and Client:

- Allowance of attorney's fees to assignee for creditors, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 4.
- Oral agreement to convey land to attorney for services as within statute of frauds, see **FRAUDS, STATUTE OF**, 2.
- Liability of community for torts of attorney, see **HUSBAND AND WIFE**, 5.
- Counterclaim in action by client to recover money collected and withheld by attorney, see **SET-OFF AND COUNTERCLAIM**.

Authority:

- Of officers after assignment for benefit of creditors, see **CORPORATIONS**, 3.
- Of state game warden to open season, see **GAME**.

Automobiles:

- Fraud in procuring insurance on, see **INSURANCE**, 4, 5, 7.
- Collision with in city street, see **MUNICIPAL CORPORATIONS**, 11-17.
- Care required of driver, see **MUNICIPAL CORPORATIONS**, 17.
- Collision with street car, see **STREET RAILROADS**.

Avoidance:

- Of insurance policy, see **INSURANCE**, 4, 5, 7, 8.

Award:

- In condemnation, satisfaction of, see **MUNICIPAL CORPORATIONS**, 5.

Bailment:

1. **BAILMENT (3)—CARE AND USE—NEGLIGENCE OF BAILEE—LIABILITY.** A bailee of a scow for the mutual benefit of the parties is not liable as an insurer for damages that the scow may sustain, but only for failure to exercise ordinary care. *Burley v. Hurley-Mason Co.* 415
2. **SAME (3)—PRESUMPTIONS.** There is a presumption of negligence on the part of a bailee where the property was delivered to him in good condition and returned damaged, casting upon him the burden of showing ordinary care. *Burley v. Hurley-Mason Co.* 415
3. **SAME (8)—EVIDENCE OF NEGLIGENCE—SUFFICIENCY.** There is sufficient evidence that a scow was delivered to a bailee in good condition, where it appears that it would have capsized when loaded, if its bottom had been in the condition it was in when returned. *Burley v. Hurley-Mason Co.* 415
4. **SAME (8).** The presumption of negligence by a bailee from the fact that a scow, received in good condition, was returned with a damaged bottom, is not overcome, where the injury indicated that it had rested upon a hump on the beach where it had been moored. *Burley v. Hurley-Mason Co.* 415

Banks and Banking:

- Liability of deposits in bank to garnishment, see **GARNISHMENT**.

1. **BANKS AND BANKING (7, 26)—INSOLVENCY—ASSETS—GENERAL OR SPECIAL DEPOSITS—PREFERENCES.** Where both drawer and payee of a check were customers of the bank and payment of mortgage bonds sold by the bank was made by the check, the check was not a trust fund and in any event did not entitle the payee to a preferred claim on insolvency of the bank prior to the presentation of the check, since the check did not augment the funds of the bank. *Zimmerli v. Northern Bank & Trust Co.* 624
2. **BANKS AND BANKING (20, 31)—DEPOSITS FOR COLLECTION—DRAFT WITH BILL OF LADING ATTACHED—TITLE.** A bank becomes the absolute owner of a draft drawn by a depositor upon a person at a dis-

Banks and Banking—Continued.

- tance, and unrestrictedly indorsed and accepted for deposit subject to private check; and it is immaterial that the same was forwarded for collection attached to a bill of lading for goods shipped and to be delivered to the drawee on payment of the draft. *Vickers v. Machinery Warehouse & Sales Co.*..... 576
3. **BANKS AND BANKING (31)—EVIDENCE (7)—JUDICIAL NOTICE.** The courts must take judicial notice of the custom of attaching bills of lading to drafts and passing them along for collection. *Vickers v. Machinery Warehouse & Sales Co.*..... 576
4. **BANKS AND BANKING (31)—RELATION BETWEEN BANK AND DEPOSITOR FOR COLLECTION—RIGHT TO CHARGE BACK AFTER COLLECTION.** A bank having through its agent or correspondent bank collected a draft, drawn by its customer and deposited to the customer's private checking account, has no right to charge back any part of the amount. *Vickers v. Machinery Warehouse & Sales Co.*..... 576
5. **SAME (31, 33)—DRAFTS—TITLE TO PROCEEDS.** In such a case, it is immaterial that, by the universal custom of bankers, the bank reserved the right to charge the amount back to the depositor in case of failure to collect the draft. *Vickers v. Machinery Warehouse & Sales Co.*..... 576
6. **SAME.** It is also immaterial that the bank intended to charge interest on the amount advanced until payment of the drafts. *Vickers v. Machinery Warehouse & Sales Co.*..... 576
7. **BANKS AND BANKING (41)—CLEARING HOUSE ASSOCIATIONS—RULES AS PART OF CONTRACT.** Where nonmembers of a clearing house association must consent to be governed by the rules of the association in order to obtain benefits of its contract with a member to clear its checks, the rules of the association are a part of the contract. *Moore v. American Sav. Bank & Trust Co.*..... 148
8. **SAME (41)—CLEARING HOUSE ASSOCIATIONS—CONTRACTS—LIABILITY ON CHECKS OF NON-MEMBER—RULES.** Under the rules of a clearing house association making a member liable for all checks cleared for a nonmember until delivery of a written notice of discontinuance of the agency, such member is liable to the other members on the checks of a nonmember paid by the other members prior to the receipt of notice of discontinuance; and it is immaterial whether the liability be discharged by payment direct to the other members or to the clearing house association for their benefit. *Moore v. American Sav. Bank & Trust Co.*..... 148
9. **SAME.** In such a case, a rule of the association making checks the property of the member presenting the same until paid or "returned," does not authorize the discharge of the liability by a return of good checks regular on their face; since the return of such

Banks and Banking—Continued.

- checks unpaid would be in direct violation of the spirit and rules of the association. *Moore v. American Sav. Bank & Trust Co.*... 148
10. SAME. The liability of a member of a clearing house association on checks cleared for a nonmember under rules making it liable until written notice of discontinuance of the agency, is not a liability *in futuro*, attaching after insolvency of the nonmember, where the checks were taken by the other members before notice of the discontinuance, and the day before the nonmember closed its doors for the transaction of business; and hence the same is not violative of the trust fund theory as declared by Rem. Code, § 3303-2, providing that no bank or association shall have a lien or charge for any advance or clearance or liability incurred, against the assets of any bank or business whose property or business has been taken over by the state bank examiner. *Moore v. American Sav. Bank & Trust Co.* 148
 11. SAME. In such a case the taking of security from the nonmember to indemnify the member from loss, is not an unlawful preference of a creditor or the creating of any lien by payment made or "liability incurred" after insolvency, notwithstanding payment of the clearances was not made until after insolvency; since the legal debt and lien was created the moment the member's liability became fixed on the day before the bank examiner took possession. *Moore v. American Sav. Bank & Trust Co.*..... 148
 12. SAME. In such a case, moneys and securities deposited by the nonmember to be used by the member clearing its checks, do not create merely a guaranty or lien that could in any sense be a violation of the statute or the trust fund theory. *Moore v. American Sav. Bank & Trust Co.*..... 148
 13. SAME. A nonmember of a clearing house association that has deposited money and securities with a member as a guaranty and to secure the benefit of having its checks cleared for it, cannot set up the defense of *ultra vires*, where it was impossible to put the parties *in statu quo*. *Moore v. American Sav. Bank & Trust Co.* 148

Bar:

- By election of concurrent remedy, see ELECTION OF REMEDIES.
 Laches as bar in equity, see EQUITY.
 Of action by limitation, see INSURANCE, 6.

Beds:

- Title to abandoned river bed, see NAVIGABLE WATERS.

Beneficiaries:

- In charitable trust, see CHARITIES.
 In mutual benefit policy, see INSURANCE, 3, 8, 9.

Benefits:

Fraternal benefit insurance, see **INSURANCE**, 3, 6, 8, 9.

Bequests:

In general, see **WILLS**.

Bigamy:

Effect of bigamous marriage, see **MARRIAGE**.

Void marriage with alien enemy as affecting right to benefit of act tolling statute of limitations during war period, see **WAR**.

Bill of Lading:

Drafts with bill of lading attached, see **BANKS AND BANKING**, 2, 3.

Bill of Sale:

Of sawmill, construction as to subject-matter, see **SALES**, 1.

Bills and Notes:

Delay of executor as bar to action on note, see **EQUITY**, 1.

Forgery of check, see **FORGERY**.

1. **BILLS AND NOTES (7)—CONSIDERATION—SUFFICIENCY.** There is sufficient consideration for a note to a bank, where it was given in settlement of the indebtedness of a corporation in which the maker was interested and the maker was to receive the balance due after collateral securities of the corporation had been sold by the bank. *Moore v. Kildall*..... 504
2. **SAME (7)—CONSIDERATION—ESTOPPEL.** After the insolvency of a bank, the maker of a promissory note given as "live paper" to deceive the bank examiner, is estopped to allege want of consideration. *Moore v. Kildall*..... 504
3. **BILLS AND NOTES (97)—DEFENSES—BREACH OF CONTEMPORANEOUS PROMISE.** It is no defense to an action on a mortgage note that plaintiff breached its contemporaneous oral agreement to employ defendant as its attorney, where the exact amount of the note was delivered to defendant at the time of the execution of the note. *Osner & Mehlhorn, Incorporated, v. Loewe*..... 550
4. **BILLS AND NOTES (132)—EVIDENCE (168)—COLLATERAL AGREEMENT LIMITING LIABILITY—PAROL EVIDENCE.** In the absence of fraud or mistake, the principal maker of a promissory note cannot set up an independent collateral agreement limiting or exempting him from liability. *Moore v. Kildall*..... 504
5. **BILLS AND NOTES (138)—WEIGHT AND SUFFICIENCY OF EVIDENCE—FRAUD.** Affirmative defenses, to actions upon notes given in payment for a machine, are sustained where it appears that the sale was induced by false representations, and that later there was a readjustment of the matter whereby plaintiffs agreed to cancel the

Bills and Notes—Continued.

notes and accept payment for the machine from a corporation to be organized. *Minnick v. Kitt*..... 433

6. **BILLS AND NOTES (142) — PAYMENT—EVIDENCE—SUFFICIENCY.** In an action on a promissory note given to the deceased, a payment thereon of \$2,000 and not \$3,000, as claimed by the debtor, is sufficiently shown, although deceased signed and gave a receipt reciting that \$3,000 was on that date received as part payment on the note, where the receipt stub and the indorsement on the back of the note indicated a payment of but \$2,000, the ledger account kept by the executor showed the same amount, subsequent payments of interest on the remaining principal showed overpayment if the debtor's claims were accepted as true, and another circumstance indicated a probable mistake in writing the receipt. *Burnham v. Rowley* 656

Bona Fide Purchaser:

Of municipal bonds, see **MUNICIPAL CORPORATIONS**, 19.

Bonds:

- Supersedeas or stay pending appeal, see **APPEAL AND ERROR**, 4.
 Contractors' bonds, see **COUNTIES**, 1.
 For construction of county road, see **COUNTIES**, 2,
 To pay cost of improvement, on failure of special fund, see **MUNICIPAL CORPORATIONS**, 4.
 Municipal bonds, see **MUNICIPAL CORPORATIONS**, 18, 19.
 Sale of municipal bonds at discount, see **USURY**, 1.

Books of Account:

Admissibility in evidence, see **WITNESSES**, 1.

Boundaries:

- Acquiescence of adverse party, see **ADVERSE POSSESSION**, 1, 2.
 Of school district, see **SCHOOLS AND SCHOOL DISTRICTS**.
 1. **BOUNDARIES (13)—LOCATION OF LINE — EVIDENCE — SUFFICIENCY.** In an action to establish a boundary line, the true line is not shown to have been marked by an old division fence for twenty years, where it appears that such fence was about thirty feet from the quarter line and was but a continuation of a fence on one side of a highway sixty feet wide, the center line of which was the quarter line, and was not originally built as a dividing line, the other land being unenclosed. *Cartwright v. Hamilton*..... 685

Breach:

- Of contemporaneous oral agreement as defense, see **BILLS AND NOTES**, 3.
 Of contract, see **CONTRACTS**, 4, 5; **JOINT ADVENTURES**.

Breach—Continued.

- Of contract by payment to contractor on public work, see COUN-
TIES, 1.
- Measure of damages for breach of contract, see DAMAGES, 3, 5.
- Liability of agent for owner's breach of contract, see PRINCIPAL AND
AGENT, 1.
- Of contract of sale, see SALES, 2-5.

Briefs:

- Delay in filing, see APPEAL AND ERROR, 6, 7.

Brokers:

- Competency as to damages from loss of lease through fraud, see
EVIDENCE, 4.
- Fraud in sale of property, see FRAUD, 1-3.
- Sufficiency of contract of employment, see FRAUDS, STATUTE OF, 3.
- Insurance broker, see INSURANCE, 1, 2.
- Agency in general, see PRINCIPAL AND AGENT.

Building Contracts:

- Performance by architect violating building ordinance, see CON-
TRACTS, 5.
- Measure of damages for breach of contract by owner, see DAMAGES,
5.
- Liability of agent for owner's breach of contract, see PRINCIPAL AND
AGENT, 1.

Buildings:

- Affected by mechanics' liens, see MECHANICS' LIENS.
- Regulation of, see MUNICIPAL CORPORATIONS, 9, 10.

Burden of Proof:

- To overcome presumption of negligence of bailee, see BAILMENT, 2.

Cancellation of Instruments:

- Rescission of contract for exchange of property, see EXCHANGE OF
PROPERTY.
- Vacation of judgment, see JUDGMENT, 1, 2.
- Rescission of contract for sale of personalty, see SALES, 2-5.

Causes of Action:

- Amendment changing cause of action, see PLEADING, 6.

Certiorari:

1. CERTIORARI (30) — SCOPE AND EXTENT OF REVIEW — OBJECTIONS.
Upon certiorari to review an adjudication of public necessity, error
in omitting to prove the filing of a partnership certificate cannot
be urged on appeal where the objection was not raised below. *State*
ex rel. Stephens v. Superior Court..... 205

Cessation of Controversy:

On appeal, see APPEAL AND ERROR, 2.

Change:

Of boundary of district, see SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

Change of Grade:

Liability of city for deficiency in special fund to pay for improvement, see MUNICIPAL CORPORATIONS, 4-8.

Change of Venue:

Of civil actions, see VENUE.

Charge:

In accounting of assignee for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 3.

To jury in criminal prosecutions, see CRIMINAL LAW, 4-6, 9, 10.

To jury in civil actions, see TRIAL, 3, 4.

Charities:

Bequests to charitable institution, see WILLS, 3.

1. CHARITIES (3)—"CHARITABLE INSTITUTION." A county tuberculosis sanitarium rendering free services, is a "charitable" institution, within the meaning of a will, notwithstanding it is supported by funds raised by taxes. *In re Wilson's Estate*..... 491

Checks:

As trust fund of insolvent bank, see BANKS AND BANKING, 1.

Clearing checks for nonmember of clearing house association, see BANKS AND BANKING, 7-13.

Liability of member of clearing house association on checks cleared for nonmember, see BANKS AND BANKING, 8-13.

Forgery of checks, see FORGERY.

Child:

Support of crippled child by parent, see PARENT AND CHILD.

Chose in Action:

Assignment of, see ASSIGNMENTS.

Cities:

See MUNICIPAL CORPORATIONS.

Civil Service:

Application to municipal agents and employees, see MUNICIPAL CORPORATIONS, 1, 2.

Claims:

Against assignee on accounting, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 3.

Claims—Continued.

- Against bond of contractor on public work, see COUNTIES, 1.
- Against county, see COUNTIES, 3, 4.
- Filing claim for lien, see MECHANICS' LIENS, 1.
- Of lien on property in hands of receiver, see RECEIVERS.

Clearing House Associations:

- See BANKS AND BANKING, 7-13.

Collateral Agreement:

- As limiting maker from liability, see BILLS AND NOTES, 4.

Collateral Attack:

- On judgment, see JUDGMENT, 2, 3.

Collection:

- Deposits for collection, title to, see BANKS AND BANKING, 2, 4-6.

Collision:

- Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 11-17.
- Between street cars or with vehicles, see STREET RAILROADS.

Commencement of Action:

- What constitutes, see ACTION, 2, 3.

Commissioners:

- Powers of state fair commissioners in collection and custody of funds, see AGRICULTURE.

Community Property:

- See HUSBAND AND WIFE.

Compensation:

- Allowance of attorney's fees to assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4.
- Of corporate officer or agent, see CORPORATIONS, 6.
- Of employee under civil service, see MUNICIPAL CORPORATIONS, 2.
- For property taken or damaged, on failure of special fund to pay cost of improvement, see MUNICIPAL CORPORATIONS, 4.
- Of state officers, see STATES.

Competency:

- Of evidence in civil actions, see EVIDENCE, 1.
- Of experts as witnesses, see EVIDENCE, 4, 5.
- Of witnesses in general, see WITNESSES, 1.

Complaint:

- In civil action, see PLEADING, 2, 4-7.

Computation:

Of loss of profits, see DAMAGES, 4.

Conclusion:

Of witness, see EVIDENCE, 4, 5.

Conclusions of Law:

Review of, see APPEAL AND ERROR, 20.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Conditional Sales:

Elevator installed under conditional sales contract as fixture, see FIXTURES, 1, 2.

Conditions:

Precedent to condemnation for private way of necessity for logging road, see EMINENT DOMAIN, 10.

Precedent to right of materialman to lien, see MECHANICS' LIENS, 1.

Precedent to rescission of contract by buyer, see SALES, 5.

Precedent to equitable relief from usurious contract, see USURY, 2.

Confirmation:

Of foreclosure sale, see MORTGAGES, 6-8.

Consideration:

Of bill of exchange or promissory note, see BILLS AND NOTES, 1, 2.

Constitutional Law:

Validity of law defining "jointist" and making it a felony, see INTOXICATING LIQUORS, 1.

Increase of officer's salary, see STATES.

Laws reducing interest on delinquent taxes as violating vested rights, see TAXATION, 2.

1. CONSTITUTIONAL LAW (32)—DELEGATION OF LEGISLATIVE POWERS. To construe the game laws to authorize the state game warden and county game commissioners to allow the killing of blue grouse in Columbia county contrary to express statutory enactment, would confer upon them legislative functions and render the act unconstitutional. *State v. Thompson*..... 525
2. CONSTITUTIONAL LAW (39)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATURE. The question whether an indebtedness is for a public purpose is ultimately a question for the courts, although a legislative declaration on the subject is entitled to great weight and should be upheld unless it appears beyond reasonable doubt to be mere pretense or dissimulation. *Rust v. Kitsap County*..... 170

Constitutional Law—Continued.

3. CONSTITUTIONAL LAW (70, 71)—POWER OF STATE IN GENERAL—SUPERIORITY OVER PRIVATE CONTRACT. Laws of 1917, p. 448, § 4, permitting the condemnation of a ditch by one of several tenants in common, does not violate the obligation of the contract between the cotenants; since the eminent domain statutes are paramount and superior to contract rights. *State ex rel. Lincoln v. Superior Court* 615

Construction:

- Of contracts, see CONTRACTS, 3.
 Of statute relating to filing of claims against county, see COUNTIES, 3, 4.
 Of eminent domain statutes, see EMINENT DOMAIN, 1, 9.
 Of statutes, see STATUTES, 2-4.
 Of contracts for sale of land, see VENDOR AND PURCHASER, 1, 2.

Continuance:

- Parties entitled to continuance of civil action, see ARMY AND NAVY.

Contractors:

- Claims against surety on contractor's bond, see COUNTIES, 1.

Contracts:

- See JOINT ADVENTURES; PARTNERSHIP; WORK AND LABOR.
 Assignment, see ASSIGNMENTS.
 Bailment, see BAILMENT.
 With clearing house association, see BANKS AND BANKING, 7-13.
 Bills and notes, see BILLS AND NOTES.
 Laws impairing obligation of, see CONSTITUTIONAL LAW, 3.
 For employment of stockholder, see CORPORATIONS, 1.
 With creditors, after assignment for benefit of creditors, see CORPORATIONS, 3.
 For county highway work, see COUNTIES, 1.
 Measure of damages for breach, see DAMAGES, 3-5.
 Parol evidence to explain technical terms, see EVIDENCE, 3.
 Rescission for fraud, see EXCHANGE OF PROPERTY.
 Agreements within statute of frauds, see FRAUDS, STATUTE OF.
 Promise of guaranty, see GUARANTY.
 Of insurance in general, see INSURANCE, 3-9.
 Written agreements, limitation on, see LIMITATION OF ACTIONS.
 Liabilities incurred under agent's contracts, see PRINCIPAL AND AGENT, 1.
 Agreement by railroad to construct spur track, see RAILROADS.
 Sales of personalty, see SALES.
 Specific performance, see SPECIFIC PERFORMANCE.
 Stipulation in actions, see STIPULATIONS.

Contracts—Continued.

Construction of to determine ownership of property for taxation, see **TAXATION**, 1.

Sale of land, see **VENDOR AND PURCHASER**.

1. **CONTRACTS (4)—ESSENTIALS—MUTUALITY.** A promise to employ defendant as plaintiff's attorney, without any obligation on the attorney's part to do the work, in unenforcible. *Osner & Mehlhorn, Incorporated v. Loewe*..... 550
2. **CONTRACTS (11)—REQUISITES — IMPLIED CONTRACTS — REPUDIATION OF GOVERNMENT CONTRACT.** Where the government had a direct interest in an agreement between a construction company and a commissary company for the messing of officers at a military post, and agreed to reimburse the construction company for its expenditures in giving the commissary company free use of facilities, there could be no implied contract on the part of the commissary company to pay for such use, should the government repudiate its promise and charge the cost to the construction company or refuse to allow the cost thereof in its settlement with the construction company. *Hurley-Mason Co. v. Pacific Commissary Co.*..... 439
3. **CONTRACTS (71) — EVIDENCE (179) — PAROL EVIDENCE TO VARY WRITING—INTENT—CONSTRUCTION BY PARTIES.** Upon an issue as to the construction of a contract for the sale of land, it is inadmissible to show by parol the construction placed upon the writing by the officers of the land company at the time the company prepared and adopted the printed forms for contracts. *McLaren v. Narrows Land Co.* 402
4. **CONTRACT (131, 151)—OPERATION AND EFFECT—PERFORMANCE OR BREACH—ACTS CONSTITUTING BREACH.** A promise by a construction company to present in its own name, when its own claims had been adjusted, a claim of its subcontractor, a commissary company, against the government, does not relieve the subcontractor of its obligation to the construction company; nor is the same breached until its own claims were adjusted. *Hurley-Mason Co. v. Pacific Commissary Co.*..... 439
5. **CONTRACTS (134) — PERFORMANCE — SUFFICIENCY — ARCHITECT'S PLANS VIOLATING BUILDING ORDINANCE.** An architect employed to make plans for an apartment house of a given style and dimensions cannot recover on *quantum meruit* for plans for a building which would be a violation of the building ordinances, where the architect had notice of the location; and it is immaterial that the contract was for a building similar to another which, unknown to the owner, violated the ordinances. *Bebb v. Jordan*..... 73

Contribution:

Assignability of right of action for, see **ASSIGNMENTS**.

Rights of guarantors, see **GUARANTY**, 2, 3.

Limitation of action, see **LIMITATION OF ACTIONS**.

Contributory Negligence:

- Of person injured by collision in street, see MUNICIPAL CORPORATIONS, 13, 14.
- Of owner of grain destroyed by fire, see NEGLIGENCE, 2.
- Of driver of auto as question for jury, see STREET RAILROADS, 4.

Control:

- Of company by majority stockholder, see CORPORATIONS, 2.

Conversations:

- Cross-examination of witness as to conversations, see WITNESSES, 2.

Conversion:

- Wrongful conversion of personal property, see TROVER AND CONVERSION.

Conveyances:

- See ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS.
- In fraud of creditors, see FRAUDULENT CONVEYANCES.
- As security for debt, see MORTGAGES.
- Mortgaged property, see MORTGAGES, 4, 5.

Corporations:

- See MUNICIPAL CORPORATIONS.
- Admissions by corporate officers or agents as evidence against corporation, see EVIDENCE, 2.
- School districts, see SCHOOLS AND SCHOOL DISTRICTS.

1. CORPORATIONS (73)—STOCKHOLDERS—SERVICES—CONTRACT FOR EMPLOYMENT. A written agreement by a corporation to employ a stockholder while he held the stock, the "stock and position transferable," fixing no time when the employment was to begin, does not show an intent to pay wages prior to the time fixed by an oral contract of the parties, where the primary purpose of the writing was to aid in the disposal of the stock. *Pesha v. Pratt*..... 382
2. CORPORATIONS (180)—MAJORITY STOCKHOLDERS—CONTROL OF COMPANY. A majority stockholder has a right to control the business policy of the company if he acts in a reasonably competent and efficient manner. *Kahan v. Alaska Junk Co.*..... 39
3. CORPORATIONS (214)—ASSIGNMENT FOR CREDITORS—AUTHORITY OF OFFICERS AFTER ASSIGNMENT. After a corporation has become insolvent and made an assignment for the benefit of creditors, its secretary is without any authority to bind it by making a new contract with a creditor agreeing to pay an account and amounting to an account stated. *Hurley-Mason Co. v. Pacific Commissary Co.* 439
4. CORPORATIONS (216, 218) — RECEIVERS — APPOINTMENT—GROUNDS—CRIMINAL ACTS. A receiver will not be appointed of a solvent cor-

Corporations—Continued.

- poration because of dishonest or criminal acts committed by a majority stockholder in control of its business, unless the evil acts are systematic and habitual and a part of its general business, and injunctive relief would not afford a complete remedy. *Kahan v. Alaska Junk Co.*..... 39
5. SAME (216, 218). A minority stockholder, seeking the appointment of a receiver in such a case, must show that he has exhausted all other remedies and tried to stop the criminal acts. *Kahan v. Alaska Junk Co.*..... 39
6. CORPORATIONS (308)—OFFICERS—COMPENSATION—VOTE BY INTERESTED TRUSTEE. A board of trustees of a corporation consisting of five members cannot, by the passing of three resolutions, vote compensation for past services to four of the members, although one resolution was for a salary as secretary, one for a salary as treasurer, and the other for legal services to two other trustees; since all but one member were pecuniarily interested in the general plan, and to be valid it would be necessary that three disinterested members vote for the passage of each resolution. *Wonderful Group Mining Co. v. Rand*..... 557

Costs:

- Of public improvement, on failure of special fund, see MUNICIPAL CORPORATIONS, 4-8.
- Of constructing temporary spur track for shipper, see RAILROADS.
1. COSTS (69)—ON APPEAL—FAILURE OF RESPONDENT TO APPEAR. No costs on appeal will be allowed to a respondent who makes no appearance in the supreme court. *Ames v. Duff and Youk*..... 259

Cotenancy:

See TENANCY IN COMMON.

Counterclaim:

See SET-OFF AND COUNTERCLAIM.

Counties:

- Delegation of legislative powers to county game commissioners, see CONSTITUTIONAL LAW, 1.
- Accrual of action against county for personal injuries to wife, see DEATH, 2.
- Matters relating to school districts, see SCHOOLS AND SCHOOL DISTRICTS.
1. COUNTIES (46) — CONTRACTOR'S BONDS — ACTIONS — CLAIMS — PAYMENT TO CONTRACTOR—LIABILITY OF SURETY. Where a contract for road work required the contractor to buy cement from the county, and to pay for the same monthly in cash or by deductions from

Counties—Continued.

the monthly estimates, and the county neglected to take pay for the cement and paid the contractor in full, it breached the contract and cannot recover for the cement from the surety on the contractor's bond. *Lewis County v. Aetna Accident & Liability Co.* 333

2. COUNTIES (62, 81)—LIMITATIONS ON INDEBTEDNESS—SUBMISSION TO VOTERS—COUNTY PURPOSE. The construction of a county road is for a strictly county purpose, within Const., art. 8, § 6, authorizing the issue of bonds by counties without vote of the people within the limitation of one and one-half per centum of the taxable property of the county. *Rust v. Kitsap County*..... 170
3. COUNTIES (88)—STATUTES (86)—RETROACTIVE EFFECT—REMEDIES—CLAIMS AGAINST COUNTY. The last part of the proviso to Laws of 1919, p. 414, to the effect that no pending or future action against a county shall be defeated by the failure of a person to verify or file the claim if action be brought within three years, where a claim had heretofore been filed and rejected, does not show an intent to make the act retroactive and applicable to claims that accrued before the act took effect; but has application to the first part of the proviso relating to claimants who shall be incapacitated from verifying and filing their claims. *Horner v. Pierce County*..... 386
4. COUNTIES (88)—STATUTES (86)—CONSTRUCTION—RETROACTIVE EFFECT—REMEDIES—CLAIMS AGAINST COUNTY. Laws of 1919, p. 414, requiring claims against counties to be filed within sixty days after the cause of action accrued, and prescribing the requisites of the notice of claim, is not retroactive and has no application to causes of action that accrued long prior to the taking effect of the act. *Horner v. Pierce County*..... 386

Courts:

Power to permit amendment to change form of action, see ACTION, 1.
 Review of decisions, see APPEAL AND ERROR.
 Jurisdiction on special appearance, see APPEARANCE.
 Judicial power, see CONSTITUTIONAL LAW, 2.
 Appeals from justice courts, see CRIMINAL LAW, 1.
 Mandamus to courts, see MANDAMUS.
 Jurisdiction of nonresident acquired by substituted service, see PROCESS, 2.
 Construction of statutes, see STATUTES, 2-4.
 Trial of civil actions, see TRIAL.

Creditors:

See FRAUDULENT CONVEYANCES.
 Payment by voluntary assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
 Preferences by insolvent bank, see BANKS AND BANKING, 1, 10-12.

Criminal Law:

See FORGERY; HOMICIDE.

Appointment of receiver because of criminal acts of majority stockholder, see CORPORATIONS, 4.

Violation of liquor laws, see INTOXICATING LIQUORS.

Scope and extent of redirect examination, see WITNESSES, 3.

1. CRIMINAL LAW (60-4)—APPEAL FROM JUSTICE COURT—DILIGENCE—DISMISSAL. It is the duty of defendant appealing from a conviction in justice court to diligently prosecute his appeal, which will be dismissed on motion of the state where the justice's transcript was not filed for nearly six months, and nothing had been done to have it filed within a reasonable time. *State v. Berg*..... 422
2. SAME (102) — EVIDENCE — RES GESTAE — STATEMENTS OF ACCUSED. In a prosecution for homicide, the defendant's statements to his wife after returning home on the day the crime was committed, are too remote in time to be admissible as part of the *res gestae*. *State v. Gottstein* 600
3. CRIMINAL LAW (135)—EVIDENCE—SELF-SERVING DECLARATIONS. In a prosecution for homicide, defendant's statements to his wife as to his movements are inadmissible as self-serving declarations, where he did not testify and there was no evidence to impeach him. *State v. Gottstein*..... 600
4. SAME (301)—TRIAL—INSTRUCTIONS—FORM AND LANGUAGE. It is not error to refuse a request to address the instructions to each juror individually rather than to the jury as a body. *State v. Chittenden* 213
5. SAME (312)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS. In a prosecution for embezzlement, a hypothetical instruction to the effect that, if certain things were true, certain other things were necessarily true, is not so prejudicial as to warrant a new trial, where the court's interpretation of the defendant's version of the transaction was correct and the jury were instructed that he could not be found guilty even if he committed a breach of faith. *State v. Skinner* 435
6. SAME (316) — TRIAL — INSTRUCTIONS ALREADY GIVEN. It is not error to refuse instructions that are given in substance in the general charge. *State v. Chittenden*..... 213
7. CRIMINAL LAW (347-1)—NEW TRIAL—JURORS READING NEWSPAPER ARTICLES. Where accused voluntarily consented to the separation of the jury, he can not ask a new trial on the ground that during the recesses the jurors read newspaper articles on the matter involved, in the absence of a positive showing that the reading of the articles resulted in the returning of verdict not upon the evidence, but as a result of passion and prejudice from the articles read. *State v. Skinner* 435

Criminal Law—Continued.

8. SAME (442)—APPEAL—REVIEW—VERDICTS. A verdict of guilty on conflicting evidence cannot be set aside where there was sufficient evidence to justify the verdict and to do so would interfere with the jury's prerogative of measuring the credibility of the witnesses. *State v. Skinner*..... 435
9. CRIMINAL LAW (452)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Where the jury were instructed to base their verdict exclusively on the evidence, and the prosecutor's remarks were not over-zealous, it is not prejudicial error to refuse to instruct that the jury should not consider the opinion of the prosecutor. *State v. Chittenden* 213
10. CRIMINAL LAW (452)—HOMICIDE (401)—APPEAL—HARMLESS ERROR—INSTRUCTIONS INVITED. Error cannot be predicated upon submitting the question of murder in the second degree, where accused requested the submission of second degree murder and manslaughter. *State v. Gottstein*..... 600

Crops:

Damage from trespass by animals, see ANIMALS.

Cross-Complaint:

See PLEADING, 1.

Cross-Examination:

See WITNESSES, 2.

Crossings:

Accidents at street crossings, see MUNICIPAL CORPORATIONS, 11-14.

Damages:

For trespass by animals, see ANIMALS.

Reduction of as curing error in verdict, see APPEAL AND ERROR, 23.

For wrongful death, see DEATH.

Expert testimony, see EVIDENCE, 4.

For fraud, see FRAUD, 4-6.

Liability of landlord for disturbing possession of tenant, see LANDLORD AND TENANT, 1.

Injuries from public improvements, see MUNICIPAL CORPORATIONS, 4.

To property while in possession of buyer, as affecting right to rescind for breach of warranty, see SALES, 4.

In actions for specific performance of contracts, see SPECIFIC PERFORMANCE, 1.

Segregation of in verdict against joint tort feorsors, see TRIAL, 5.

For conversion, see TROVER AND CONVERSION.

1. DAMAGES (50)—MEASURE—EXPENSES INCURRED. The reasonable value of expenses incurred is sufficiently shown by evidence that towing charges were made at the rate fixed by the public service

Damages—Continued.

- commission, and that other items expended were the reasonable value thereof. *Burley v. Hurley-Mason Co.*..... 415
2. DAMAGES (52)—LANDLORD AND TENANT (54)—MENTAL SUFFERING—PHYSICAL INVASION. There can be no recovery against a landlord for acts causing mental suffering and distress on the part of the tenant who was sick in a hospital, where there was no physical invasion of the person or acts amounting to an assault. *Barnes v. Bickle* 133
3. DAMAGES (66)—GUARANTY (9)—MEASURE OF DAMAGES FOR BREACH OF CONTRACT. The measure of damages for breach of a contract guaranteeing the payment of the purchase price of land, is the balance due upon the price, plus interest and taxes. *Hardinger v. Hainsworth* 590
4. DAMAGES (66, 74)—MEASURE OF DAMAGES—BREACH OF CONTRACT—LOSS OF PROFITS—COMPUTATION. The measure of damages through breach of a contract to furnish a "boat to stand by" to assist in fishing operations, is the loss in catch which would have been made if the boat had been furnished, where on repeated demands promises were made to furnish the boat and a boat was furnished for but five days out of eighteen days of fishing; since the conduct was such as to mislead plaintiff. *Florence Fish Co. v. Everett Packing Co.* 1
5. DAMAGES (73)—MEASURE OF DAMAGES—BREACH OF BUILDING CONTRACT. The measure of damages for the owner's breach in cancelling a building contract is the amount of profits which might reasonably be anticipated, being the difference between the contract price and the cost; and it is error to add anything for the contractor's loss of his time during which he sought other work. *Di Luck v. Bradner Company, Incorporated.*..... 291
6. DAMAGES (84)—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,458, for injuries sustained by a pedestrian struck by a motor truck, is not excessive, where there was a fracture of the neck of the left femur, the plaintiff was in bed for over six weeks and suffered much during that time, she could get about only on crutches at the time of the trial, and the medical testimony showed that it was questionable whether there would be a bony union of the parts, that the limb was one-half inch shorter than before the accident, and that the injury would probably be permanent. *Olsen v. Peerless Laundry* 660
7. DAMAGES (92-1)—EXCESSIVE DAMAGES—INJURY TO REAL PROPERTY. A verdict for damages to a mill site and boom location by the construction of a railroad will not be held to be excessive and given under the influence of passion and prejudice, where there was a decided conflict in the evidence, the jury viewed the premises, the

Damages—Continued.

question depended largely on the credibility of witnesses, and the case was carefully tried and submitted on proper instructions, and the verdict was amply supported by the testimony. *Clark Lloyd Lumber Co. v. Puget Sound & U. R. Co.*..... 232

8. SAME (113) — EVIDENCE — LOSS OF PROFITS — BREACH OF FISHING CONTRACT—ESTIMATES—ADMISSIBILITY. Upon an issue as to the damages for breach of a contract to furnish a "boat to stand by" to assist a fishing boat, evidence of the catch on days when the assistance was furnished, and on other days when compelled to fish without it, is admissible to show the loss in the catch, it appearing that the fish were running in great schools which had to be avoided and could not be handled without the aid of the stand-by boat. *Florence Fish Co. v. Everett Packing Co.*..... 1

Death:

Knowledge of as affecting limitation of action, see INSURANCE, 6.
Assignment of contract as affecting right to refund of purchase money on death of holder, see VENDOR AND PURCHASER, 2, 3.

1. DEATH (13, 14)—PERSONS ENTITLED—DIVISION OF DAMAGES. The statute having failed to apportion the damages recoverable by defendants for wrongful death, a division of \$1,600 to a widow, and \$650 to a minor son, will not be set aside on the widow's appeal, in view of the financial condition of the parties and the fact that the widow, recently married to deceased, received life insurance and the deceased's back pay, some \$2,250, and that the son was a cripple, all of which are proper matters for the consideration of the court. *Schultz v. Western Farm Tractor Co.*..... 351
2. DEATH (16)—LIMITATION OF ACTIONS (40) — ACCRUAL—TORTS OF COUNTY—DEFECTIVE SIDEWALKS. A husband's cause of action against a county for damages for personal injuries to his wife, who died two and one-half years thereafter as a result of the injuries, accrued at the time of the injury and not at the time of her death. *Horner v. Pierce County*..... 386

Debt:

For public purpose as question for court, see CONSTITUTIONAL LAW, 2.
Agreement to satisfy debt, see GUARANTY.
Separate or community nature of, see HUSBAND AND WIFE, 5.
Existence of debt to be secured, see MORTGAGES, 1.
Assumption of mortgage debt, see MORTGAGES, 4.
Power of city to assume deficiency in local improvement fund as general debt, see MUNICIPAL CORPORATIONS, 5-8.

Debtor and Creditor:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCES.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.

Testimony as to transactions with persons since deceased, see WITNESSES, 1.

Decision:

Review on appeal, see APPEAL AND ERROR, 1, 2.

On appeal, see APPEAL AND ERROR, 25, 26.

Declarations:

As evidence in criminal prosecutions, see CRIMINAL LAW, 2, 3.

As evidence in civil actions, see EVIDENCE, 2.

Deeds:

Absolute deed as mortgage, see MORTGAGES, 1-4.

Recording deed intended as mortgage, see MORTGAGES, 3.

Default:

Judgment by, see JUDGMENT, 2, 3.

In payment of interest, see MORTGAGES, 5.

Defenses:

To bill or note, see BILLS AND NOTES, 3-5.

Deficiency:

In special fund to pay cost of improvement, see MUNICIPAL CORPORATIONS, 4-8.

Deficiency Judgment:

Stay bond pending appeal from in foreclosure suit, see APPEAL AND ERROR, 4.

Degrees:

Instructions as to lesser offense, see HOMICIDE.

Delay:

As causing cessation of controversy, see APPEAL AND ERROR, 2.

In filing record or briefs, see APPEAL AND ERROR, 5-7.

As bar to action, see EQUITY.

As affecting adequacy of remedy, see MANDAMUS.

As waiver of right to rescind for breach of warranty, see SALES, 3.

In rejecting goods sold, see SALES, 6.

Delegation:

Of legislative powers, see CONSTITUTIONAL LAW, 1.

Delinquent Tax:

Change of law as to rate of interest on, see TAXATION, 2, 3.

Delivery:

- Of property attached to realty, see **FIXTURES**, 2.
- Of building material, notice to owner, see **MECHANICS' LIENS**, 2.
- Failure to deliver possession as ground for rescission by buyer, see **SALES**, 2.

Demand:

- To support action against assignee, see **ACCOUNT**.

Depositions:

1. **DEPOSITIONS (1)—WHEN MAY BE TAKEN—SPECIAL PROCEEDINGS.**
Upon a special appearance to quash service of summons, raising questions of fact as to whether defendant was doing business in this state or had an agent herein upon whom service of summons could be made, depositions may be taken in opposition to the motion, under Rem. Code, §§ 1231, 1232, authorizing the same in any pending action, suit or proceeding at any time after service of summons, under the liberal construction of the code required by Rem. Code, § 144. *State ex rel. Rothwell & Co. v. Superior Court*..... 63
2. **SAME (5)—TIME OF TAKING.** Rem. Code, § 1232, authorizing the taking of depositions at any time after service of summons, means at any time after the court has acquired jurisdiction of the particular proceeding by means equal in its legal effect to service of summons. *State ex rel. Rothwell & Co. v. Superior Court*..... 63

Deposits:

- In bank, see **BANKS AND BANKING**, 1, 2, 4-6.
- Garnishment of draft sent to bank for collection, see **GARNISHMENT**.

Description:

- Of property, sufficient to answer statute of frauds, see **FRAUDS**, **STATUTE OF**, 3, 4.

Devisees:

- Rights of under will, see **WILLS**, 4.

Devises:

- See **WILLS**.

Diligence:

- In prosecuting appeal from conviction in justice court, see **CRIMINAL LAW**, 1.

Directing Verdict:

- In civil actions, see **TRIAL**, 2.

Discount:

- Sale of bonds at discount, see **MUNICIPAL CORPORATIONS**, 18, 19.

Discretion of Court:

To extend time for filing transcript and briefs, see **APPEAL AND ERROR**, 6.

Review in civil actions, see **APPEAL AND ERROR**, 14.

Dismissal of action for want of prosecution, see **DISMISSAL AND NON-SUIT**.

To allow amendment of pleadings, see **PLEADING**, 4, 6, 8.

Reopening case for further evidence, see **TRIAL**, 1.

Dismissal and Nonsuit:

Dismissal for delay in filing record on appeal, see **APPEAL AND ERROR**, 5.

Dismissal of appeal for lack of diligence, see **CRIMINAL LAW**, 1.

1. **DISMISSAL AND NONSUIT (21)—WANT OF PROSECUTION.** It is not an abuse of discretion to dismiss an action for want of prosecution where no effort was made by plaintiff to bring it to trial for ten years, and repeated continuances had been granted at plaintiff's request. *Greenwood v. Puget Mill Co.*..... 464

Districts:

School districts, see **SCHOOLS AND SCHOOL DISTRICTS**.

Ditches:

Condemnation of irrigation ditch, see **EMINENT DOMAIN**, 1-4.

Division:

Of damages to persons entitled, see **DEATH**, 1.

Division Lines:

See **BOUNDARIES**.

Divorce:

Amendment to change action for separate maintenance to one for divorce, see **ACTION**, 1.

As affecting insurable interest, see **INSURANCE**, 3.

Amendment of complaint to state cause of action for, see **PLEADING**, 7.

Draft:

Title to proceeds of draft deposited for collection, see **BANKS AND BANKING**, 2, 4-6.

As property subject to garnishment, see **GARNISHMENT**.

Duplicity:

In pleading, see **PLEADING**, 2.

Election of Remedies:

1. **ELECTION OF REMEDIES (1, 6)—JUDGMENT (95)—VACATION—CONCURRENT REMEDIES.** A motion in the original action to vacate a default judgment for want of jurisdiction, and an independent action

Election of Remedies—Continued.

in equity seeking the same relief, are concurrent remedies, and the election to exercise one forecloses the use of the other; and upon an adverse judgment, the only remedy is by appeal. *Stolze v. Stolze* 398

Elections:

Submitting issuance of county bonds to electors, see COUNTIES, 2.

Elevators:

As fixtures, see FIXTURES, 1, 2.

Embezzlement:

Instructions in prosecution for, see CRIMINAL LAW, 5.

Eminent Domain:

Amendment of complaint regarded as made, see APPEAL AND ERROR, 12.

Condemnation of ditch by cotenant as violating obligation of contract, see CONSTITUTIONAL LAW, 3.

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 3-8.

1. EMINENT DOMAIN (7, 21)—IRRIGATION—USE OF DITCH—RIGHT TO CONDEMN—STATUTES—CONSTRUCTION. Laws of 1917, p. 448, § 4, declaring the beneficial use of water to be a public use and granting the right to enlarge existing structures employed for public use, by necessary implication grants the right to use them when so enlarged. *State ex rel. Lincoln v. Superior Court*..... 615
2. EMINENT DOMAIN (30)—IRRIGATION DITCHES — PROPERTY DEVOTED TO PUBLIC USE—RIGHTS OF TENANTS IN COMMON IN DITCH. Condemnation by one of the joint owners of a ditch for the purpose of carrying additional water merely adds an additional servitude entitling the co-owners to compensation, and does not deprive them of the right to the beneficial use of waters, declared by Laws of 1917, p. 448, § 4, to be a public use. *State ex rel. Lincoln v. Superior Court* 615
3. EMINENT DOMAIN (39)—NECESSITY — EVIDENCE — SUFFICIENCY. A sufficient necessity for condemnation for irrigation is shown by evidence that a water supply will make good a deficiency for the irrigation of certain lands, and also bring under cultivation other arid and unproductive land. *State ex rel. Lincoln v. Superior Court* 615
4. SAME (39) — IRRIGATION DITCHES — FEASIBILITY OF ROUTE — EVIDENCE—SUFFICIENCY. Under Rem. Code, § 6364, preventing the condemnation of improved or occupied land for a new irrigation ditch without the owner's consent where an existing ditch will carry the water, the ditch is the only property that can be condemned for

Eminent Domain—Continued.

- carrying additional water, where that was feasible and practicable.
State ex rel. Lincoln v. Superior Court..... 615
5. SAME (39) — NECESSITY FOR APPROPRIATIONS — EVIDENCE — SUFFICIENCY. A reasonable necessity for the condemnation of lands for a main state highway is shown, notwithstanding evidence that the lands are valuable for wheat growing in large tracts, that the straight road sought would cut up the tracts and greatly reduce the value of the lands, and that present roads following the section lines are available, where it appears that the section line roads would require dangerous curves and increase the length of the road one mile, the original paving of which would cost \$25,000. *State v. Superior Court*..... 542
6. SAME (39, 40)—NECESSITY—SELECTION OF ROUTE—FEASIBILITY OF OTHER ROUTE. Condemnation for a private way of necessity for a logging road is not shown to be unnecessary by the fact that the logs could be taken out and hauled over a paved public highway by trucks, where the pavement would be ruined by such use. *State ex rel. Stephens v. Superior Court*..... 205
7. SAME (39, 40). In the absence of bad faith or abuse of power in the selection of a route for a private way of necessity for a logging road, the condemnation cannot be defeated by evidence that another route is feasible. *State ex rel. Stephens v. Superior Court* 205
8. SAME (39, 40). Whether there is a reasonable necessity for a private way for a logging road must be determined from the entire situation; and findings of necessity are not supported where it appears that there was a floatable stream which the relator could use, notwithstanding it was not as convenient as desired due to the fact that floating logs without booms might result in jams and injury to the property. *State ex rel. Stephens v. Superior Court*..... 205
9. EMINENT DOMAIN (101, 104)—STATE ROADS—PROCEEDINGS — STATUTES—CONSTRUCTION. Under Rem. Code, § 5872, authorizing the state to condemn lands for state highways in the manner prescribed for condemnations for county roads, and § 5635, providing for county road condemnations, in case the commissioners after hearings and notices are unable to agree with owners, "in the manner provided by law for taking private property for public use" by proceedings under Id., §§ 921-936, the state may proceed under the last named sections without the hearings, notices or agreements referred to in the establishment of county roads, it not being the intention to impose upon the state the preliminary details imposed upon counties. *State v. Superior Court*..... 542
10. EMINENT DOMAIN (104) — PROCEEDINGS—CONDITIONS PRECEDENT Rem. Code, § 5857-3, providing that, as a condition precedent for condemnation for a private way of necessity, a logging road shall con-

Eminent Domain—Continued.

tract and agree to carry timber products at reasonable prices, is satisfied by the filing of the contract at the time of the adjudication of public necessity. *State ex rel. Stephens v. Superior Court* 205

Employees:

See MASTER AND SERVANT.

Of city, under civil service, see MUNICIPAL CORPORATIONS, 1, 2.

Equity:

See SPECIFIC PERFORMANCE.

Suits for accounting, see ACCOUNT.

Necessity of exceptions to findings in equity case, see APPEAL AND ERROR, 3.

Review of findings on appeal in equity, see APPEAL AND ERROR, 16.

Contract within statute of frauds as ground for equitable relief, see FRAUDS, STATUTE OF, 5.

Relief against judgment, see JUDGMENT, 1, 2.

Relief from usurious contract, see USURY, 2.

1. EQUITY (41)—EXECUTORS AND ADMINISTRATORS (149)—LACHES—LIMITATIONS—EFFECT OF DELAY. Delay of an executor in instituting an action to recover a claimed balance due on a promissory note for a period of five years should not affect the right to recover any sum justly due the estate; especially where, if the principal of the note had been fully liquidated, the debtor would have had a right of action for recovery of the note; since there was as much delay on his part as upon the part of the executor in instituting the action. *Burnham v. Rowley*..... 656
2. EQUITY (46)—LACHES AND STALE DEMANDS—FOLLOWING STATUTE. Laches does not bar a right of action upon the renewal of a written guaranty, which was given in consideration of forbearance to sue and to prevent the statute from running, where action was commenced within the statutory period after the second writing was entered into, and the action was between the original parties. *Hardinger v. Hainsworth*..... 590

Escrows:

Oral agreement to permit grantor to redeem property as within statute of frauds, see FRAUDS, STATUTE OF, 1.

As creating relation of mortgagor and mortgagee, see MORTGAGES, 1.

Establishment:

Of boundaries, see BOUNDARIES.

Of school districts, see SCHOOLS AND SCHOOL DISTRICTS.

Estates:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

Tenancy in common, see TENANCY IN COMMON.

Estoppel:

- To allege error in civil actions or proceedings, see **APPEAL AND ERROR**, 9, 10.
- To allege want of consideration, see **BILLS AND NOTES**, 2.
- By election of remedy, see **ELECTION OF REMEDIES**.
- To deny validity of unacknowledged lease, see **FRAUDS, STATUTE OF**, 5.
- To avoid insurance policy, see **INSURANCE**, 5, 8.
- By recitals in bonds, see **MUNICIPAL CORPORATIONS**, 19.

Evidence:

- In actions on accounts, see **ACCOUNT, ACTION ON**.
- Of damage to crops by trespassing animals, see **ANIMALS**.
- Review of rulings as dependent on exception in lower court, see **APPEAL AND ERROR**, 3.
- Harmless error on appeal, see **APPEAL AND ERROR**, 21, 22.
- As to negligence of bailee, see **BAILMENT**, 3, 4.
- Judicial notice of custom of attaching bills of lading to drafts and forwarding for collection, see **BANKS AND BANKING**, 3.
- In action on bill or note, see **BILLS AND NOTES**, 4-6.
- Of boundaries, see **BOUNDARIES**.
- Construction of contract, see **CONTRACTS**, 3.
- In criminal prosecutions, see **CRIMINAL LAW**, 2, 3.
- Of reasonable value of expenses incurred, see **DAMAGES**, 1.
- Of loss of profits on breach of fishing contract, see **DAMAGES**, 8.
- Depositions, see **DEPOSITIONS**.
- Condemnation proceedings, see **EMINENT DOMAIN**, 3-8.
- Of fraud of administrator, see **EXECUTORS AND ADMINISTRATORS**, 2.
- Of forgery, see **FORGERY**.
- In action for fraud, see **FRAUD**, 2-4.
- Separate property of married woman, see **HUSBAND AND WIFE**, 2.
- Community character of property, see **HUSBAND AND WIFE**, 3.
- Of incompetency of ward, see **INSANE PERSONS**.
- Of breach of contract, see **JOINT ADVENTURES**.
- In action for injuries from defective premises, see **LANDLORD AND TENANT**, 2.
- For malicious prosecution, see **MALICIOUS PROSECUTION**.
- For injuries to servant, see **MASTER AND SERVANT**, 3.
- Character of deed as mortgage, see **MORTGAGES**, 2.
- For injuries in streets, see **MUNICIPAL CORPORATIONS**, 11, 14, 15.
- For negligence in allowing fire to start, see **NEGLIGENCE**.
- To impeach sheriff's return, see **PROCESS**, 3.
- Stipulations affecting admission of, see **STIPULATIONS**.
- For injuries by street railroads to person on or near tracks, see **STREET RAILROADS**, 1, 2.
- Existence of relation, see **TENANCY IN COMMON**.
- Reception at trial, see **TRIAL**, 1.
- In action for conversion, see **TROVER AND CONVERSION**.

Evidence—Continued.

Testamentary capacity, see WILLS, 1.

Of undue influence procuring making of will, see WILLS, 2.

To aid in construction of will, see WILLS, 3.

Admissibility of evidence as to transactions with decedent, see WITNESSES, 1.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE (48)—COMPETENCY—VALUE OF PROPERTY. The assessment rolls showing the assessed valuation of property are not competent evidence of the value, as between the owner and third persons. *American State Bank v. Butts*..... 612
2. EVIDENCE (95) — ADMISSIONS—BY CORPORATE OFFICER. After a corporation has become insolvent and made an assignment for the benefit of creditors, a letter written by the secretary of the corporation agreeing to pay a claim is not admissible as independent evidence of a declaration or admission by the corporation that the claim was a just obligation. *Hurley-Mason Co. v. Pacific Commissary Co.* 439
3. EVIDENCE (179) — PAROL EVIDENCE — SHOWING INTENT—EXPLANATION OF NAUTICAL TERMS. In an action upon a fishing contract oral evidence of experienced fishermen as to the meaning and the duties in those waters of a "boat to stand by," which the company had agreed to furnish to the fishing boat, is admissible as explanatory of technical words or those having a general meaning and a meaning peculiar to the business. *Florence Fish Co. v. Everett Packing Co.* 1
4. EVIDENCE (204) — EXPERT TESTIMONY — VALUE OF APARTMENT HOUSE LEASE. The testimony of a real estate man experienced for many years in buying and selling apartment house leases in the same city, that a lease is worth fifteen months' profit, is competent upon an issue as to the amount of damages from loss of the purchase of a lease through fraud. *Kelly v. Merritt*..... 426
5. EVIDENCE (211) — OPINIONS — COMPETENCY—VALUE OF LAND. A witness who had lived in a town over thirty years and laid out the townsite, and knew the property in question and its value, is competent to testify as to the value. *Kriegler v. Spokane Merchants' Ass'n* 179

Examination:

Of witnesses in general, see WITNESSES, 2, 3.

Exceptions:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 3.

Exceptions, Bill of:

Time for filing, see **APPEAL AND ERROR**, 5.

Excessive Damages:

See **DAMAGES**, 6.

Exchange of Property:

Fraud in trade of lands, see **FRAUD**, 4, 6.

1. **EXCHANGE OF PROPERTY (2)—REMEDIES—FRAUD—RESCISSION.** A contract for the exchange of properties may be rescinded for false representations that land was valuable farming land capable of being cropped and with a crop on it worth \$10,000, where the same was relied upon without examination of the land which was at a distance. *Nordstrom v. Hover*..... 176

Excuse:

For failure to file lien claim, see **MECHANICS' LIENS**, 2.

Execution:

Stay bond pending appeal from deficiency judgment, see **APPEAL AND ERROR**, 4.

By wife of husband's lease of separate property, see **HUSBAND AND WIFE**, 1.

1. **EXECUTION (50) — SALE—VACATION—INADEQUACY OF PRICE.** An execution sale of property of the value of \$4,000, for \$87.92 will be set aside where the debtors acted promptly on receiving notice, and the creditor failed to pursue simple and adequate remedies and had lulled the debtors into a sense of security by crafty silence during the period of redemption. *Lovejoy v. Americus*..... 571
2. **EXECUTION (60, 61)—RIGHTS PASSING TO PURCHASER—LIENS.** An execution purchaser of mortgaged premises succeeds to all the rights of the mortgagors and is entitled to pay interest until the date of maturity to avoid a foreclosure of the mortgage. *Tibbets v. Bush & Lane Piano Co.*..... 165

Executive Construction:

As aid to statutory construction, see **STATUTES**, 2.

Executors and Administrators:

Delay by executor in bringing action on note, see **EQUITY**, 1.

1. **EXECUTORS AND ADMINISTRATORS (26)—REMOVAL—GROUNDS—FRAUD OF ADMINISTRATRIX.** An order removing deceased's widow as administratrix of the estate is warranted where she represented that there was no personal property and failed to account for personal property and money of the value of \$2,888. *In re Fick's Estate* 318
2. **EXECUTORS AND ADMINISTRATORS (62)—ALLOWANCE TO WIFE—VACATION OF ORDER—FRAUD—EVIDENCE—SUFFICIENCY.** An order setting

Executors and Administrators—Continued.

aside real estate to a widow under Laws of 1917, p. 607, § 103, is properly vacated for fraud, where it was obtained by false statements as to its value and lack of personal property, and without any notice to minor heirs. *In re Fick's Estate*..... 318

3. EXECUTORS AND ADMINISTRATORS (141)—RIGHTS OF ADMINISTRATORS—BY BENEFICIARY. Where an administrator refuses to bring an action for an accounting upon stock held for an estate, an interested heir may bring the action. *Kriegler v. Spokane Merchants' Ass'n* 179

Exemptions:

Transfer of exempt property as in fraud of creditors, see FRAUDULENT CONVEYANCES.

Expenses:

Measure of damages for expenses incurred, see DAMAGES, 1.

Expert Testimony:

Testimony in civil actions, see EVIDENCE, 4, 5.

Extension:

Of time for filing record or briefs, see APPEAL AND ERROR, 5, 6.

False Representations:

See FRAUD.

Fees:

Allowance of attorney's fees to assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4.

Ferries:

Ferry law as general or special act, see STATUTES, 5.

1. FERRIES—STATUTES (45)—IMPLIED REPEAL—REGULATION OF FERRIES. The ferry law, Rem. Code, §§ 4998 to 5013-1, being a special law covering the whole subject and vesting control of ferries in the county commissioners, was not impliedly repealed by the public service commission law, Id., § 8626-1 *et seq.*, for the regulation of public utilities by the state commission; since the last act does not cover the whole subject matter of the former one, and was not intended to take its place. *State ex rel. Allen v. Public Service Commission* 294

Filing:

Statement of facts in lower court, see APPEAL AND ERROR, 5.

Transcript and briefs, see APPEAL AND ERROR, 6, 7.

Claims against county, see COUNTIES, 3, 4.

Claim or statement of mechanics' lien, see MECHANICS' LIENS, 1.

Claim of lien on property in hands of receiver, see RECEIVERS.

Findings:

Review as dependent on exception in lower court, see **APPEAL AND ERROR**, 3.

Review on appeal or writ of error, see **APPEAL AND ERROR**, 16-20.

Duty of court to make, upon request, in law action, see **TRIAL**, 6.

Fire Insurance:

See **INSURANCE**, 4, 7.

Fires:

Police regulation of buildings, see **MUNICIPAL CORPORATIONS**, 9, 10.

Loss of property by fire, see **NEGLIGENCE**.

Fish:

Damages for breach of fishing contract, see **DAMAGES**, 8.

Fixtures:

1. **FIXTURES (8, 9)—AS SUBJECT OF MECHANICS' LIENS—VENDOR AND VENDEE—MORTGAGEES AND SUBSEQUENT LIENORS.** An elevator installed in an apartment building under a conditional sales contract with the owner of the premises reserving title to the elevator in the elevator company until fully paid for, although personalty as between the parties, becomes a fixture, as the parts are attached to the building, as to a mortgagee for future advances and other lienors furnishing labor and material for the building, where the mortgage advances and other lien claims arose contemporaneously with the installation of the elevator without notice of the conditional sales contract, which was not recorded; the circumstances being such as to warrant a belief that the elevator was becoming a part of the building without resort to other protection than the personal liability of the owner and the right to a lien against the building. *King v. Title Trust Co.*..... 508
2. **SAME.** In such a case, the fact that the elevator company, upon completing installation of the elevator, retained possession of the reverse lever controlling its operation, does not show non-delivery of the elevator, preventing passing of the title, since the parts became attached to the realty as fixtures as the same were attached to the building. *King v. Title Trust Co.*..... 508
3. **FIXTURES (9)—BETWEEN VENDOR AND VENDEE—WALLED-IN SAFE.** A safe, walled into a building with brick and which could not be taken out without tearing down the walls, is a fixture which passes to the purchaser of the building. *Kriegler v. Spokane Merchants' Ass'n* 179

Foreclosure:

Of mortgage, see **MORTGAGES**, 5-8.

Forfeiture:

Of insurance policies for fraud, see **INSURANCE**, 4, 5, 7, 8.

Forgery:

1. **FORGERY (7-1)—EVIDENCE—SUFFICIENCY.** A conviction of forgery is sustained by evidence that defendant cashed a check purporting to be drawn by a fuel company, that no such company could be found, and that the payee's endorsement was probably written by the same person who drew and signed the check. *State v. Chittenden* 213

Form:

Of instructions, see **TRIAL**, 3.

Of verdict in action against joint tort feorsors, see **TRIAL**, 5.

Forms of Action:

Amendment to change form of action, see **ACTION**, 1; **PLEADING**, 6, 7.

Fraternal Insurance:

See **INSURANCE**, 3, 6, 8, 9.

Fraud:

See **BILLS AND NOTES**, 5.

In exchange of property, see **EXCHANGE OF PROPERTY**.

As ground for removal of administrator, see **EXECUTORS AND ADMINISTRATORS**, 1.

As ground for vacating order setting aside real estate to widow, see **EXECUTORS AND ADMINISTRATORS**, 2.

Forfeiture of insurance for fraud, see **INSURANCE**, 4, 5, 7.

As ground for opening or vacating judgment, see **JUDGMENT**, 1, 2.

Of agent, see **PRINCIPAL AND AGENT**, 2.

In affidavit for publication of summons, see **PROCESS**, 3.

1. **FRAUD (4)—MATTERS OF FACT OR OPINION.** Representations by a bank acting as selling agent of mortgage bonds that they were A-1 security, when the security in part was bad, are not admissible as fraudulent representations, being in effect mere expressions of opinion. *Zimmerli v. Northern Bank & Trust Co.* 624
2. **FRAUD (4, 5, 22)—MATTERS OF FACT OR OPINIONS—EVIDENCE—SUFFICIENCY.** Sales agents who visited the land with a view of accepting the agency and could easily have ascertained that it was alkali and unfit for cultivation, and who knew there was no irrigation system in operation, are liable for false representations as to the character of the soil and crops that could be grown, and that an irrigation system had been built and was in operation; such representations being more than mere opinion. *Lasman v. Calhoun, Denny & Ewing* 467

Fraud—Continued.

3. **FRAUD (6, 22)—RELIANCE ON REPRESENTATIONS—EVIDENCE—SUFFICIENCY.** The purchasers of an apartment house lease are entitled to rely on representations of real estate brokers that a purchaser of the apartment house on sheriff's sale, assuming to be the owner of the premises and consenting to an assignment of the lease, was the owner and had agreed to renew the lease, and may recover for fraud upon proof that the representations were false. *Kelly v. Merritt* 426
4. **FRAUD (7, 22)—ACTION—DAMAGES—RELIANCE UPON REPRESENTATIONS—EVIDENCE—SUFFICIENCY.** The evidence sustains a verdict for damages from misrepresentations in the trade of lands for a second mortgage, secured upon land of little value, where the character of the land and the responsibility of the makers and indorsers of the note was misrepresented and the plaintiff was persuaded not to inspect the land; and the mere fact that plaintiff made inquiry from other sources does not preclude relief, if the information gained failed to disclose the fraud. *Jones v. Elliott*..... 138
5. **FRAUD (23)—DAMAGES—MEASURE.** The measure of damages for fraud resulting in the loss of the purchase of an apartment house lease is the difference between the value of the apartment as it was, and what it would have been if the lease could have been procured. *Kelly v. Merritt*..... 426
6. **SAME (23-26)—ACTION FOR DAMAGES — MEASURE — INSTRUCTIONS.** In an action for fraud in misrepresenting the value of lands traded, it is competent to show the value of the plaintiff's land, in order to show damages and to submit that issue, notwithstanding the measure of damages is the difference between the value of the property received by plaintiff and its value if it had been as represented. *Jones v. Elliott*..... 138

Frauds, Statute of:

1. **FRAUDS, STATUTE OF (9)—ORAL AGREEMENT FOR LAND—REDEMPTION FROM MORTGAGE.** An oral agreement to permit the grantor in an escrow deed one year in which to redeem the property, relates to real property, within the statute of frauds, and is unenforceable. *John R. O'Reilly, Inc., v. Tillman*..... 594
2. **FRAUDS, STATUTE OF (9)—AGREEMENTS RELATING TO REAL PROPERTY.** An oral contract to convey an interest in real estate to an attorney in consideration of services is within the statute of frauds and void. *Martin v. Bateman*..... 634
3. **FRAUDS, STATUTE OF (20, 35)—BROKER'S COMMISSION—DESCRIPTION OF LANDS—SUFFICIENCY.** A contract for a broker's commission on a sale of "40 acres at Forest," is not sufficiently certain under the statute requiring the same to be in writing, and the contract was not completed so as to take the same out of the operation of the

Frauds, Statute of—Continued.

statute where it was cancelled and the property sold for a less price.
Big Four Land Co. v. Daracunas..... 224

4. **FRAUDS, STATUTE OF (35)—LEASES—DESCRIPTION OF LANDS—POSSESSION.** The going into possession and performance of the terms of a lease is sufficient to cure an imperfect description of the premises and take the contract out of the operation of the statute of frauds. *Zinn v. Knopes*..... 606

5. **SAME (54)—WAIVER OF BAR—PART PERFORMANCE—ESTOPPEL.** An unacknowledged lease for a period of three years will be held binding for the whole term, notwithstanding the statute of frauds, under the principles of estoppel, where the lessee had performed acts called for in the contract making it inequitable to cancel the lease and abandon increase in stock for which he had stored feed, and which could not be marketed profitably. *Zinn v. Knopes*..... 606

Fraudulent Conveyances:

1. **FRAUDULENT CONVEYANCES (16)—EXEMPT PROPERTY.** A conveyance of a homestead, exempt because of less value than \$2,000, is not fraudulent as to creditors. *American State Bank v. Butts*.. 612

Funds:

Collection and custody by state fair commissioners, see **AGRICULTURE**.

Game:

Delegation of legislative powers to county game commissioners, see **CONSTITUTIONAL LAW, 1**.

1. **GAME—CREATION OF OPEN SEASON—POWERS OF GAME WARDEN—STATUTES—CONSTRUCTION.** Under Laws of 1917, p. 166, § 3, by which the seasonal pursuit of blue grouse in Columbia county is absolutely withdrawn and made unlawful, the state game warden has no power to grant the county game commission authority to open a season, by virtue of *Id.*, p. 166, § 1, subd. 9, which provides that the state game warden may grant permission to "shorten, close or open the season" on any upland birds; it not being the intention to grant power to "open" a season where no seasonal regulation is provided or to lengthen any season created by the act. *State v. Thompson* 525

Garnishment:

1. **GARNISHMENT (56)—DEPOSITS IN BANK.** The proceeds of a draft sent to a bank for collection cannot be garnished on a claim against the drawer where the bank became the absolute owner of the draft. *Vickers v. Machinery Warehouse & Sales Co.*..... 576

Guaranty:

Deposit by nonmember of clearing house association to secure benefit of having checks cleared, see **BANKS AND BANKING, 11-13**.

Guaranty—Continued.

Measure of damages for breach of contract, see DAMAGES, 3.

Laches as affecting right of action upon a renewal of a written guaranty, see EQUITY, 2.

Limitation of action by guarantor to enforce contribution, see LIMITATION OF ACTIONS.

1. GUARANTY (2)—NATURE OF OBLIGATION—ENFORCEMENT—WAIVER OF RIGHTS. Where a guarantor of the purchase price of property, in consideration of forbearance and to prevent the running of the statute, in writing "renewed" his original guaranty, it became an original obligation notwithstanding it was called a guaranty. *Hardinger v. Hainsworth*..... 590
2. GUARANTY (20)—PRINCIPAL AND SURETY (63)—RIGHT TO CONTRIBUTION. The right of contribution arises in favor of a joint guarantor who pays the common debt, although he took an assignment of it and the obligation of the principal debtor was not cancelled or satisfied. *Pioneer Mining & Ditch Co. v. Davidson*..... 262
3. GUARANTY (20)—PRINCIPAL AND SURETY (63)—RIGHT TO CONTRIBUTION—ASSUMPTION OF DEBT BY THIRD PERSON. Where a joint guarantor contracted with a third person to satisfy the obligation, such person, in paying the proportion of the co-guarantors, was not paying its own debt or the debt of its privy, and it was therefore entitled to exact contribution from the other obligors whose debt was paid. *Pioneer Mining & Ditch Co. v. Davidson*..... 262

Guardian and Ward:

Guardianship of insane persons, see INSANE PERSONS.

Harmless Error:

In civil actions, see APPEAL AND ERROR, 21-24.

In criminal prosecutions, see CRIMINAL LAW, 5, 9, 10.

Heads of Families:

Signing petition for change of boundary of school district, see SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

Health:

Regulation of buildings for protection of as exercise of police power, see MUNICIPAL CORPORATIONS, 9, 10.

Heirs:

Rights on refusal of executor to bring action, see EXECUTORS AND ADMINISTRATORS, 3.

Highways:

Limitation on expenditures for county roads, see COUNTIES, 2.

Appropriation of land for highways, see EMINENT DOMAIN, 5, 9.

Homestead:

As subject of fraudulent conveyance, see FRAUDULENT CONVEYANCES.

Homicide:

Evidence in prosecution for, see CRIMINAL LAW, 2, 3.

Submission of second degree murder as harmless error, see CRIMINAL LAW, 10.

Scope and extent of redirect examination, see WITNESSES, 3.

1. HOMICIDE (121)—TRIAL—INSTRUCTIONS AS TO LESSER OFFENSE. In a prosecution for murder, and instruction should not be given as to manslaughter, where the evidence excludes the possibility that the killing occurred without design, except that it was done in an attempt to commit robbery which is murder in the first degree. *State v. Gottstein*..... 600

Hunting:

Powers of game warden to open season for birds, see GAME.

Husband and Wife:

Actions for wrongful death of husband or wife, see DEATH, 2.

Vacation of order setting aside real estate to widow, see EXECUTORS AND ADMINISTRATORS, 2.

Bigamous marriage, see MARRIAGE.

Amendment of complaint for separate maintenance so as to state cause of action for divorce, see PLEADING, 7.

1. HUSBAND AND WIFE (2, 2-1)—PROPERTY OF HUSBAND—LEASES—EXECUTION BY WIFE. The wife need not sign a lease of the husband's separate real estate. *Zinn v. Knopes*..... 606
2. HUSBAND AND WIFE (19, 47-1, 60)—WIFE'S SEPARATE PROPERTY—PURCHASED BEFORE MARRIAGE—EVIDENCE—SUFFICIENCY. Property contracted and paid for by the wife with deed delivered to her before marriage is her separate property; and where the bare legal title was placed in a bank as security for a loan, the fact that the bank, upon payment of the loan, redeeded the property to her and her husband does not make the same community property. *Slasor v. Slasor* 90
3. HUSBAND AND WIFE (20, 58, 60)—WIFE'S SEPARATE ESTATE—PROCEEDS—COMMUNITY PROPERTY—PRESUMPTIONS—EVIDENCE. Since the status of community property is fixed at the time of its purchase, and a purchase money mortgage by both husband and wife was for the community, the fact that the balance of the purchase price was paid by the separate funds of the wife and on that account the deed was at her request taken in her name, is not sufficient to overcome the presumption that it became community property, except to the extent of her original investment, notwithstanding that the husband stated that it was her property and thereafter the mort-

Husband and Wife—Continued.

gage was in part paid off with funds given to the wife by her father.
Rawlings v. Heal..... 218

4. HUSBAND AND WIFE (47, 48)—COMMUNITY PROPERTY—EXISTENCE OF COMMUNITY—VOID MARRIAGE. Property acquired by a woman while living with a man after a bigamous marriage is her separate property. *Beyerle v. Bartsch*..... 287
5. HUSBAND AND WIFE (80, 84)—COMMUNITY PROPERTY—DEBTS CONTRACTED BY HUSBAND—ORDINARY BUSINESS—PRESUMPTIONS—WRONGFUL ACTS. A client's action against an attorney and his wife to recover of the community a sum collected by the attorney and wrongfully withheld, is not for a tort for which the attorney alone would be liable; the presumption being that the ordinary business of the husband was community business and the complaint need not negative the exceptions to the rule. *Henrickson v. Smith*..... 82
6. SAME (88) — COMMUNITY PROPERTY — ACTIONS — PARTIES. In a client's action against an attorney and his wife, seeking a judgment against the community for moneys collected and wrongfully withheld, the wife is a proper party defendant. *Henrickson v. Smith* 82
7. HUSBAND AND WIFE (94)—ACTIONS—JUDGMENT—AGAINST COMMUNITY. A judgment against S and against the community composed of S and his wife "and each of them" is not a personal judgment against the wife or a charge against her separate estate. *Henrickson v. Smith*..... 82

Implied Contracts:

See CONTRACTS, 2; LIMITATION OF ACTIONS; WORK AND LABOR.

Implied Repeal:

Of law regulating ferries, see FERRIES.

Improvements:

Public improvements, see MUNICIPAL CORPORATIONS, 3-8.

Inadequate Price:

As ground for vacating execution sale, see EXECUTION, 1.

Incompetent Persons:

See INSANE PERSONS.

Incorporation:

Of town as creating new district, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Incumbrances:

See MORTGAGES.

Indemnity:

See GUARANTY.

Index:

Recording and indexing deed intended as mortgage, see MORTGAGES, 3.

Indictment and Information:

Charging offense of being a jointist, see INTOXICATING LIQUORS, 2, 3.

Infants:

Support of crippled child by parent, see PARENT AND CHILD.

Insane Persons:

Prosecution of insanity charge, see MALICIOUS PROSECUTION.
Evidence of capacity to execute will, see WILLS, 1.

1. INSANE PERSONS (4)—GUARDIANSHIP—INCOMPETENCY—EVIDENCE—SUFFICIENCY. In proceedings to discharge a guardian, findings that the ward was competent to manage her own affairs are not sustained, where it was shown that she had made and still insisted upon an improvident bargain with a brother who was dealing unfairly with her, notwithstanding it appeared that she was not insane and required no supervision over her person. *In re Bayer's Estate* 276

Insolvency:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Preferences and transfers by insolvent bank, see BANKS AND BANKING, 1, 10-12.
Liens or charges against assets of insolvent bank, see BANKS AND BANKING, 10-12.
Of corporation, see CORPORATIONS, 3.

Inspection:

Of goods by buyer, see SALES, 6.

Instructions:

In criminal prosecutions, see CRIMINAL LAW, 4-6, 9, 10; HOMICIDE.
In civil actions, see TRIAL, 3, 4.

Insurance:

1. INSURANCE (9)—AGENCY—LICENSE TO DO BUSINESS—EFFECT ON POLICY. The fact that an insurance broker had no license to do business as required by Rem. Code, § 6059-1, does not render insurance which he obtained void or voidable, but merely renders him personally liable for the penalty provided by the act. *Day v. St. Paul Fire & Marine Insurance Co.* 49

Insurance—Continued.

2. **INSURANCE (10) — AGENTS OR BROKER — RELATION TO PARTIES — STATUTES.** Under the insurance code, Rem. Code, § 6059-1 *et seq.*, defining an "agent" as the person *appointed* and *authorized* to solicit applications and effect insurance, and a "broker" as a person not appointed who acts or aids in any manner in negotiating contracts of insurance for a party other than himself, one having no appointment and performing only the acts constituting him a broker, could not be an agent of the insurance company, and it was error to refuse to so decide as a matter of law. *Day v. St. Paul Fire & Marine Insurance Co.*: 49
3. **INSURANCE (26) — INSURABLE INTEREST — DIVORCED WIFE.** Where, at the time of granting a divorce to a wife who was the beneficiary named in a policy of fraternal insurance, the certificate was delivered to her, her insurable interest did not expire upon the procurement of the divorce; and the existence of an insurable interest at the maturity of the policy is unnecessary to enable her to collect thereon. *Teed v. Brotherhood of American Yeomen*: 367
4. **SAME (72, 73) — AVOIDANCE OF POLICY — MISREPRESENTATIONS — INTENT TO DECEIVE.** Under Rem. Code, § 6059-34, providing that no representations in the negotiation of insurance shall be deemed material or defeat the policy unless made with intent to deceive, where one has procured insurance on an automobile by false representations known by him to be false, that it was a new 1911 model, when it was a 1910 second-hand car, a presumption arises of the intent to deceive, which is not overcome by the unsupported denial of the insured. *Day v. St. Paul Fire & Marine Insurance Co.*: ... 49
5. **SAME (109, 189) — INSTRUCTIONS — ESTOPPEL — KNOWLEDGE OF AGENT.** Upon an issue as to the estoppel of an insurance company to set up the defense of deceit in misrepresenting the automobile insured as a new car, it is error to give an instruction warranting the jury in finding an estoppel if the insurance agent subsequently received notice of the age of the car, "or something of that character." *Day v. St. Paul Fire & Marine Insurance Co.*: 49
6. **INSURANCE (161) — LIMITATION OF ACTIONS — DEATH NOT KNOWN.** The provision in a benefit certificate that no action thereon shall be maintained unless brought within one year of the date of the death, does not bar an action where the death of the member was not known to either the beneficiary or the society within the year, and all dues were regularly paid. *Teed v. Brotherhood of American Yeomen* 367
7. **SAME (189) — ACTIONS ON POLICIES — INSTRUCTIONS — FRAUD.** Upon an issue as to fraud and deceit in obtaining an insurance policy, it is not prejudicial error to instruct that the defense must be established by clear and convincing evidence because it is the policy of

Insurance—Continued.

the law to deal with men on the presumption of their honesty.
Day v. St. Paul Fire & Marine Insurance Co...... 49

8. **INSURANCE (203)—FORFEITURE—ESTOPPEL OR WAIVER—POWERS OF LOCAL AGENT.** A fraternal insurance company is estopped to claim that a divorced wife was not a legal beneficiary, where, on application to change the beneficiary to a son, the local officer, charged with the duty of collecting dues, advised against the change as unnecessary and the company thereafter accepted premiums paid by the divorced wife. *Teed v. Brotherhood of American Yeomen*.. 367
9. **INSURANCE (207)—STATUTES (83)—WHO MAY BE BENEFICIARIES—DIVORCED WIFE—RETROSPECTIVE LAWS.** Rem. Code, § 6059-211, passed in 1911, limiting the payment of fraternal benefits to a wife and certain relatives, does not operate retrospectively, so as to avoid a certificate that, prior to 1911, named as a beneficiary a wife who was thereafter divorced; especially in view of § 6059-221 which provided that nothing in the act should prevent any society from continuing all contracts theretofore made in this state. *Teed v. Brotherhood of American Yeomen*..... 367

Intent:

To deceive in obtaining policy, see **INSURANCE**, 4.

Of legislature as element in construction of statutes, see **STATUTES**, 1.

Interest:

See **USURY**.

Insurable interest, see **INSURANCE**, 3.

Default in mortgages as to interest, see **MORTGAGES**, 5.

On delinquent taxes, change of law, see **TAXATION**, 2, 3.

Intoxicating Liquors:

1. **INTOXICATING LIQUORS (36-40) — OFFENSES — JOINTIST.** Laws of 1917, p. 60, § 17h, defining a "jointist" and making it a felony to open up or conduct any place for the unlawful sale of intoxicating liquor, is not unconstitutional as making an "intent" criminal without any overt act, as it is directed against the overt acts of opening, conducting or maintaining, the intent of the accused being merely incidental. *State v. Burgess*..... 537
2. **INTOXICATING LIQUORS (42)—OFFENSES—"JOINTIST"—INFORMATION—SUFFICIENCY.** An information sufficiently charges the offense of being a "jointist," defined by Laws of 1917, p. 60, § 17h, as opening up or conducting "either as principal or agent," any place for the unlawful sale of intoxicating liquor, although it does not charge that he acted as principal or agent, since he must have acted in the one capacity or the other. *State v. Rousseau*..... 533
3. **SAME (42)—INFORMATION—"JOINTIST"—PLACE OF OFFENSE.** An information charging the offense of being a "jointist," i. e. opening up

Intoxicating Liquors—Continued.

or conducting a place for the unlawful sale of intoxicating liquors, under Laws of 1917, p. 60, § 17h, is sufficient without fixing the location other than charging that the offense was committed in the county. *State v. Burgess*..... 537

4. SAME (52)—OFFENSES—PUNISHMENT—STATUTES. The offense of being a "jointist" defined by Laws of 1917, p. 60, § 17h, as a felony, is not unenforceable because it fails to specify any place of imprisonment, in view of Rem. Code, § 2265, providing that any person convicted of a felony for which no punishment is specially prescribed, shall be punished by imprisonment in the state penitentiary. *State v. Burgess* 537

Irrigation:

Condemnation for, see EMINENT DOMAIN, 1-4.

Joint Adventures:

See PARTNERSHIP.

1. JOINT ADVENTURES — ACCOUNTING — CONTRACT — PERFORMANCE OR BREACH. An action for an accounting and to quiet title to land should be dismissed as unsustainable, where plaintiffs and defendant had entered into an agreement whereby defendant advanced the money to redeem the land from foreclosure and liens, taking a mortgage and deed, the parties agreeing that defendant should have absolute control of its platting and sale, and, after all expenses were paid, sixty per cent of the net profits, and it appeared that defendant had not failed in any duty and that it had as yet been impossible to sell the land so as to obtain return of the money or any profits. *Nudd v. Rowe*..... 322

Jointist:

Prosecution of offense, see INTOXICATING LIQUORS.

Joint Tenancy:

See TENANCY IN COMMON.

Joint Tort Feasors:

Form of verdict in action against, see TRIAL, 5.

Judges:

Change of venue for prejudice of judge, see VENUE.

Judgment:

Review in general, see APPEAL AND ERROR.

Review of objections to validity of, see APPEAL AND ERROR, 8.

On appeal, see APPEAL AND ERROR, 25, 26.

Election of remedies to vacate default judgment, see ELECTION OF REMEDIES.

Judgment—Continued.

Liability of wife's estate for judgment against community, see HUSBAND AND WIFE, 7.

In specific performance, see SPECIFIC PERFORMANCE, 1.

1. JUDGMENT (115)—VACATION—GROUNDS—FRAUD—PERJURY OR FALSE TESTIMONY. Perjury alone is not an equitable ground for setting aside a judgment obtained on false testimony, in the absence of extrinsic or collateral fraud. *Bennington County Savings Bank v. France* 483
2. JUDGMENT (142-1, 163)—VACATING—PROCEEDINGS—DIRECT OR COLLATERAL ATTACK. In an action brought against the former owner, to quiet title to property acquired by a commissioner's deed under a default judgment in a former suit, a cross-complaint attacking the validity of the deed and default judgment on the ground of fraud in resorting to publication of the summons, is a direct and not a collateral attack on the judgment, and therefore sustainable, notwithstanding the cross-complaint was denominated an affirmative defense. *Schmelling v. Hoffman*..... 408
3. JUDGMENTS (156)—PROCESS (41)—COLLATERAL ATTACK—PRESUMPTIONS—RECITALS IN JUDGMENT. A recital in a default judgment of due service of summons, raises a presumption of jurisdiction notwithstanding a defective affidavit for publication shown by the record; but such presumption is overcome by an allegation and admission that the defendant was at all times a non-resident of the state and that the only service of process was by publication based upon the defective affidavit in the record. *Burns v. Stolze*..... 392

Judicial Notice:

Of custom of attaching bills of lading to drafts and forwarding for collection, see BANKS AND BANKING, 3.

Judicial Power:

See CONSTITUTIONAL LAW, 2.

Judicial Sales:

On execution, see EXECUTION.

On foreclosure of mortgage, see MORTGAGES, 6-8.

Jurisdiction:

Appellate jurisdiction in general, see APPEAL AND ERROR, 1, 2.

Effect of appearance, see APPEARANCE.

Presumptions from recitals in judgment, see JUDGMENT, 3.

Of nonresident defendant, see PROCESS, 2.

Jury:

Review of verdict as dependent on prejudicial nature of error, see APPEAL AND ERROR, 23.

Jury—Continued.

Instructions in criminal prosecutions, see CRIMINAL LAW, 4-6, 9, 10.

Custody and conduct, see CRIMINAL LAW, 7.

Taking case or question from jury at trial, see TRIAL, 2.

Instructions in civil actions, see TRIAL, 3, 4.

Justices of the Peace:

Appeals from justice court, see CRIMINAL LAW, 1.

Knowledge:

Of agent as working estoppel, see INSURANCE, 5.

Of danger of fire as affecting contributory negligence, see NEGLIGENCE, 2.

Labor:

Implied contracts to pay for services, see WORK AND LABOR, 2.

Laches:

Effect on equity, see EQUITY.

Landlord and Tenant:

Recovery against landlord for acts causing mental suffering, see DAMAGES, 2.

Requirements of statute of frauds as to leases, see FRAUDS, STATUTE OF, 4, 5.

Necessity of wife signing lease of husband's separate property, see HUSBAND AND WIFE, 1.

1. LANDLORD AND TENANT (54) — DISTURBANCE OF POSSESSION BY LANDLORD—DAMAGES. Where the landlord entered the apartment house, informed lodgers that she was in charge, raised the rent and caused lodgers to vacate, and the tenant was thereafter unable to rent the rooms, there was an invasion of the property for which the landlord would be liable in damages. *Barnes v. Bickle*.... 133
2. LANDLORD AND TENANT (77, 83)—DEFECTIVE PREMISES—INJURY TO TENANT — NEGLIGENCE — EVIDENCE — SUFFICIENCY. There being substantial evidence that a landlord had notice of the defective condition of a porch railing, which gave way and injured a tenant, who was not guilty of contributory negligence, it was error to direct a verdict for the defendant notwithstanding a verdict for the plaintiff for the personal injuries sustained. *Casey v. Williams*..... 348

Lapse of Time:

See EQUITY.

Leases:

See LANDLORD AND TENANT.

Oral leases as within statute of frauds, see FRAUDS, STATUTE OF, 4, 5.

Necessity of wife signing lease of husband's separate property, see HUSBAND AND WIFE, 1.

Legislative Construction:

As aid to statutory construction, see STATUTES, 3.

Legislative Power:

Regulation of buildings, see MUNICIPAL CORPORATIONS, 10.

Legislature:

Increase of salary of state officer during term of office, see STATES.

Intent as element in construction of laws, see STATUTES, 1.

Libel and Slander:

Libel as counterclaim in action against attorney for money collected and withheld, see SET-OFF AND COUNTERCLAIM.

Licenses:

License of agent to do business, see INSURANCE, 1.

Liens:

Mortgage liens, see MORTGAGES.

On property in hands of receiver, see RECEIVERS.

Life Insurance:

See INSURANCE, 3, 6, 8, 9.

Limitation:

Of county expenditures, see COUNTIES, 2.

Limitation of Actions:

See ADVERSE POSSESSION.

Proceedings constituting commencement of action in general, see ACTION, 2, 3.

Action for death by wrongful act, see DEATH, 2.

Laches, see EQUITY.

Provisions in policy as to time for commencement of actions, see INSURANCE, 6.

Rights of alien enemies during period of war, see WAR.

1. LIMITATION OF ACTIONS (16) — WRITTEN AGREEMENTS — IMPLIED LIABILITY. An action by a joint guarantor who paid the common debt to enforce contribution against co-guarantors is upon an implied liability arising out of a written contract, within Rem. Code, § 157, and can be maintained at any time within six years after the cause accrued. *Pioneer Mining & Ditch Co. v. Davidson*. 262

Liquors:

See INTOXICATING LIQUORS.

Loaned Servant:

Injury to third person from negligence of, see MASTER AND SERVANT, 1-3.

Location:

Of boundary line, see **BOUNDARIES**.

Logs and Logging:

Condemnation for private way of necessity for logging road, see **EMINENT DOMAIN**, 6-8, 10.

Measure of damages for conversion of lumber, see **TROVER AND CONVERSION**.

Malicious Prosecution:

1. **MALICIOUS PROSECUTION** (3, 15) — **PROBABLE CAUSE — EVIDENCE — SUFFICIENCY**. Probable cause for instituting insanity proceedings must be found, as a matter of law, and is a complete defense to an action for malicious prosecution, where it is undisputed that defendant made a complete statement of all the facts, and made the complaint on the advice of a deputy prosecuting attorney; and objection to the evidence as general is unavailing where there was no effort to have it made specific. *Inglis v. Morton*..... 373
2. **SAME** (13) — **EVIDENCE — ADMISSIBILITY**. In an action for malicious prosecution of an insanity charge, it is not error to exclude, on the issue of probable cause, the record in a civil case between the parties where it did not contradict defendant's evidence of probable cause or contain anything material to the issue. *Inglis v. Morton* 373

Mandamus:

1. **MANDAMUS** (3, 4)—**TO COURTS—REMEDY BY APPEAL**. Mandamus does not lie to compel the superior court to set aside its order sustaining a demurrer to an application for a mandamus of which it had jurisdiction; since there is a remedy by appeal and the mere question of delay does not affect the question of adequacy of the remedy. *State ex rel. Godfrey v. Superior Court*..... 101

Manslaughter:

Instructions as to in trial for murder, see **HOMICIDE**.

Marriage:

Community or separate status of property acquired during void marriage relation, see **HUSBAND AND WIFE**, 4.

Void marriage to alien enemy as affecting right to benefit of act tolling statute of limitations during war period, see **WAR**.

1. **MARRIAGE** (14-1)—**VALIDITY—BIGAMOUS MARRIAGE**. A bigamous marriage is absolutely void, under Rem. Code, § 7151, prohibiting marriages when either party has a wife or husband living; although *Id.*, § 7162, defines voidable marriages and § 983 authorizes a decree of nullity where there is any doubt as to the facts. *Beyerle v. Bartsch* 287

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

- Contracts of employment by corporation, see CORPORATIONS, 1.
 Municipal employees, see MUNICIPAL CORPORATIONS, 1, 2.
 Recovery for services on implied contract, see WORK AND LABOR.
1. MASTER AND SERVANT (21) — RELATION OF PARTIES — INJURY TO THIRD PERSON—LOAN OF SERVANT. Where a stevedore company was to furnish only the labor in loading, and the ship company had agreed to furnish the equipment and machinery, and thereupon hired an electric winch of a dock company, together with the dock company's servant to operate the winch, the operator was not loaned to the stevedore company, but to the ship company and the latter was the master of such servant and liable for his negligence, under the "loaned servant" doctrine. *Pearson v. Arlington Dock Co.* 14
 2. SAME (21)—RELATION OF PARTIES—LOANING INCOMPETENT SERVANT. The fact that a dock company, renting its electric winch to a ship company, loaned its servant to the ship company to operate the winch does not relieve it from liability for injuries to an employee of a stevedore company, occasioned by the incompetence of the operator; where he was negligently retained by the dock company after knowledge of his incompetence and request made by the stevedore company to discharge him and furnish a competent operator, since the doctrine of loaned servant relieves the first master from liability for the servant's negligence only, and not from its own negligence in furnishing an incompetent servant. *Pearson v. Arlington Dock Co.*..... 14
 3. MASTER AND SERVANT (66, 149) — EMPLOYMENT OF INCOMPETENT SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A stevedore company, bound to furnish a stevedore a safe place to work in the hold of a vessel, is sufficiently shown to be negligent by evidence that it continued operations after knowledge of the incompetence of the winchman furnished by another company to operate a winch, employed to lower heavy iron pipes into the working place. *Pearson v. Arlington Dock Co.*..... 14
 4. MASTER AND SERVANT (172) — INJURY TO THIRD PERSONS — SCOPE OF EMPLOYMENT — TRANSFER OF MOTOR AND DRIVER — LIABILITY OF HIRER. A person renting or leasing a vehicle and driver, agreeing to pay a certain amount per day therefor, is liable to third persons for injuries sustained by such vehicle due to the negligence of the driver. *Olson v. Clark.*..... 691
 5. SAME (182-1) — INJURY TO THIRD PERSONS — ACTIONS — QUESTION FOR JURY. Upon an issue as to whether defendant rented a truck which collided with and injured plaintiffs, the question is for the

Master and Servant—Continued.

jury, where the defendant did the hiring and gave directions as to the work, notwithstanding defendant's son testified that he instructed defendant to hire the truck for him upon his work, in which the defendant had no interest. *Olson v. Clark*..... 691

6. SAME (183)—INJURY TO THIRD PERSONS—ACTIONS—INSTRUCTIONS.

In an action for injuries sustained in a collision with a rented truck, the issue as to whether defendant rented the truck is properly submitted by instructions telling the jury that it was for them to determine whether defendant rented it for himself and assumed control of the work done by it. *Olson v. Clark*..... 691

Materials:

Notice to owner of delivery of, see **MECHANICS' LIENS**, 2.

Maturity:

Of debt, see **MORTGAGES**, 5.

Measure of Damages:

In general, see **DAMAGES**, 1, 3-7.

For fraud resulting in loss of apartment house lease, see **FRAUD**, 5.

For fraud on trade of lands for mortgage, see **FRAUD**, 6.

Mechanics' Liens:

Fixtures as subject of, see **FIXTURES**, 1, 2.

1. **MECHANICS' LIENS (40)—NECESSITY OF FILING CLAIMS—EXCUSES—APPOINTMENT OF RECEIVER.** In view of Rem. Code, § 1134, providing that no mechanic's lien shall "exist" unless notice is filed in the auditor's office, the failure to file a lien upon structures of a temporary nature, constructed upon city streets, is not excused by the fact that, before the time for filing had expired, a receiver was appointed and sold the structures under order of court; and no preference right can be claimed upon the fund derived from the receiver's sale without first perfecting the lien in the manner required by the statutes. *Brown v. Hunt & Mottet Co.*..... 564

2. **MECHANICS' LIENS (40-1)—NOTICE TO OWNER—NECESSITY.** Notice to the owner of the delivery of material, as required by Rem. Code, § 1133, is not necessary where the material was furnished to a contractor on the owner's order, and upon the contractor's failure to pay, the owner ordered the delivery to continue. *Miller v. Schober* 631

Mental Capacity:

To execute a will, see **WILLS**, 1.

Mental Suffering:

As element of damages, see **DAMAGES**, 2.

Misconduct:

Of jury, see CRIMINAL LAW, 7.

Of counsel ground for reversal in criminal prosecutions, see CRIMINAL LAW, 9.

Misrepresentation:

See EXCHANGE OF PROPERTY; FRAUD.

By insured, see INSURANCE, 4, 5, 7.

By agent inducing sale of lands, see PRINCIPAL AND AGENT, 2.

Money:

Collection and custody of state funds, see AGRICULTURE.

Mortgages:

Necessity for stay bond on appeal from deficiency judgment in foreclosure, see APPEAL AND ERROR, 4.

Rights of execution purchaser of mortgaged premises, see EXECUTION, 2.

Fixtures as between mortgagor and mortgagee, see FIXTURES, 1, 2.

Oral agreement for redemption as within statute of frauds, see FRAUDS, STATUTE OF, 1.

Payment of balance of purchase money mortgage by wife as evidence of community nature of property, see HUSBAND AND WIFE, 3.

1. MORTGAGES (20)—ABSOLUTE DEED AS MORTGAGE—EXISTENCE OF DEBT TO BE SECURED. The relation of mortgagor and mortgagee is not created upon the placing in escrow of a deed and notes for money advanced where both deed and notes were to be returned to the maker if paid, and if not paid, the notes were to be returned to him and the deed delivered to the grantee; since it is clear there was no intent to create an enforceable debt secured by mortgage. *John R. O'Reilly, Incorporated, v. Tillman*..... 594
2. MORTGAGES (23)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY. A deed of a half interest in a farm is not shown by clear, satisfactory and cogent proof to have been intended as a mortgage, where the evidence of one party that the deed was to secure advances to finance the farm was directly contradicted, no evidence of indebtedness was taken, and no rate of interest agreed upon, and there was direct evidence of a sale of the half interest for an agreed price, which was to be put into the farm and was in fact advanced to clear up the grantor's debts and run the place. *Boost v. Capen* 227
3. MORTGAGES (67)—ABSOLUTE DEED AS MORTGAGE—RECORDING—RECORD AS NOTICE—REQUISITES—STATUTES. Under the recording statutes, treating deeds and mortgages alike and requiring them to be indexed in the same general index, the record of a deed, absolute in form but intended as a mortgage, is notice to the world when

Mortgages—Continued.

recorded and indexed as its form suggests and the statute requires.
Haggerty v. Building Investment Co...... 638

4. SAME (102)—TRANSFER OF PROPERTY—ASSUMPTION OF MORTGAGE DEBT. A mortgagee by deed absolute in form, who gave a warranty deed to a purchaser and assumed a liability for liens not imposed by law or contract, which he was obliged to pay by reason of the warranty, cannot pass the burden to those in possession under claim of title who are in a position to demand that their obligation be limited to the strict terms of the mortgage. *Haggerty v. Building Investment Co.* 638
5. MORTGAGES (138)—RIGHT TO FORECLOSE—MATURITY OF DEBT—DEFAULT DEMANDING OPPORTUNITY TO PAY. An execution purchaser, succeeding to all the interests of the mortgagors, is entitled to pay interest until maturity; and a foreclosure prior to maturity is premature, where, upon diligent demand, the mortgagee refused to give the purchaser an opportunity to pay the interest due, since there was then no default. *Tibbetts v. Bush & Lane Piano Co.* 165
6. MORTGAGES (213)—FORECLOSURE SALE—CONFIRMATION. Confirmation of a sheriff's mortgage foreclosure sale should not be denied because of the sheriff's failure to sign the affidavit of publication of notice, where it was corrected by permission at the hearing. *Osner & Mehlhorn, Incorporated, v. Loewe*..... 550
7. SAME (213). Inadequacy of price is not ground for refusing to confirm a mortgage foreclosure sale, where a homestead declaration had been filed, it was sold to the highest bidder for less than the judgment, and the mortgagors had a year within which to redeem. *Osner & Mehlhorn, Incorporated, v. Loewe*..... 550
8. SAME (213). A mortgage foreclosure sale of four lots *en masse*. is not ground for refusing to confirm the sale, where the lots were considered as a single tract suitable for a homestead, and the sheriff's return states a sale in one parcel was deemed most advantageous. *Osner & Mehlhorn, Incorporated, v. Loewe*..... 550

Motions:

To quash service of summons, see APPEARANCE.

Municipal Corporations:

Collision of street cars with persons or vehicles on track, see STREET RAILROADS.

Sale of bonds at discount as usurious transaction, see USURY. 1.

1. MUNICIPAL CORPORATIONS (88)—EMPLOYEES—CIVIL SERVICE RULES—TRANSFERS. Under a civil service rule allowing transfers to be made from a position in one department to a similar position of the same class in another department, a vacancy need not be filled

Municipal Corporations—Continued.

from the eligible list, but a transfer may be made pursuant to the rule, which was intended for the protection and promotion of employees already in the service. *State ex rel. LaGrave v. Seattle* 340

2. SAME (88). Such a transfer would not be illegal because of an increase in the salary, where the former position carried a salary of from \$230 to \$250 a month, and the new position a salary of \$250, and left the employee in the same class, grade and character of work. *State ex rel. LaGrave v. Seattle*..... 340
3. MUNICIPAL CORPORATIONS (134)—PUBLIC IMPROVEMENTS—ORDINANCE—CONSTRUCTION. In condemnation proceedings to pay compensation to property owners through a change of street grades, under an ordinance making no provision for the physical work contemplated, the cost of the "improvement" is descriptive of the proposition and has reference only to the cost of acquiring the property rights. *Pratt v. Seattle*..... 104
4. SAME (174-177)—EMINENT DOMAIN (64)—PUBLIC IMPROVEMENTS—INADEQUACY OR FAILURE OF SPECIAL FUND—GENERAL LIABILITY. Where a city took and damaged property by making a change of grade authorized by eminent domain proceedings, contemplating that the costs be assessed against property benefited, it became unconditionally bound under Const., art. 1, § 16, to make compensation therefor in accordance with the condemnation awards; hence, where the special fund failed when it was judicially determined that the property assessed was not benefited, the city had power to make the cost a general charge against the city, and issue bonds to pay the same. *Pratt v. Seattle*..... 104
5. SAME. In such case it is immaterial that some of the owners had in form satisfied the condemnation awards in return for warrants issued against the special fund, which was never collected by the city; since the award is not in law satisfied until actually paid in money or general indebtedness warrants payable in due course. *Pratt v. Seattle*..... 104
6. SAME. Where a city undertook and completed physical improvements of streets to be paid for solely by funds to be raised by special assessments upon the property benefited, it is not liable generally for a deficiency arising when part of the assessments could not be collected because part of the property was not benefited and there was no other property benefited against which further assessments could be levied; and the city not being liable, it has no power to assume the deficiency as a general indebtedness of the city. *Pratt v. Seattle*..... 104
7. SAME. In such a case the fact that the city and the contractor were honestly mistaken in the belief that the special benefits would be sufficient to pay the costs of the improvement, does not authorize

Municipal Corporations—Continued.

the city to assume a general indebtedness for the amount of the deficiency. *Pratt v. Seattle*..... 104

8. SAME. In such a case the deficiency is not such a moral obligation on the part of the city as to authorize the city to assume its payment, where there was no attempt by the city to change from a special assessment plan to a general indebtedness prior to the completion of the improvement, and the ordinance expressly notified the contractor that the improvement was to be paid for wholly from special assessments, and that no part would be a general charge against the city. *Pratt v. Seattle*..... 104
9. MUNICIPAL CORPORATIONS (313, 315)—POLICE POWER—REGULATION OF BUILDINGS—HEALTH AND FIRE PROTECTION—ORDINANCES—POWERS OF CITY. Rem. Code, § 7507, providing that cities of the first class may regulate the manner in which buildings shall be constructed, authorizes a city to provide by ordinance for light and air area and open spaces at the rear of apartment houses. *Bebb v. Jordan*.. 73
10. SAME (327)—REGULATIONS—REASONABLENESS. It is a reasonable exercise of legislative power to require that an apartment house in a populous city have a court of a prescribed area for light and air and an open space in the rear. *Bebb v. Jordan*..... 73
11. MUNICIPAL CORPORATIONS (379, 389)—USE OF STREETS—COLLISION AT CROSSINGS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Negligence of the driver of an auto truck in colliding with a pedestrian at a street intersection is shown by his testimony that he saw the plaintiff, evidently unaware of his approach and crossing the street in line of a collision, that he was driving slowly in low gear and could have stopped within three or four feet, and that he did not alter his course, slacken his speed, or give warning of his approach; it being the duty of a driver to sound his horn in all cases where it would probably avoid an accident. *Olsen v. Peerless Laundry*.. 660
12. SAME (379, 380)—NEGLIGENCE—VIOLATION OF ORDINANCE—RIGHT OF WAY AT CROSSINGS. Under an ordinance giving to pedestrians the right of way at street intersections, pedestrians are not required to stop and yield the right of way as a matter of right to drivers of trucks and automobiles. *Olsen v. Peerless Laundry*..... 660
13. SAME (383, 391)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a pedestrian struck by an auto truck at a street crossing was guilty of contributory negligence in failing to look a second time, is a question for the jury, where both she and her companion testified that they looked before proceeding across the street and saw no approaching vehicle and the way was apparently clear; since the duty to do so would depend on the surrounding conditions and whether she had the right of way. *Olsen v. Peerless Laundry* 660

Municipal Corporations—Continued.

14. MUNICIPAL CORPORATIONS (383, 391) — STREETS — COLLISION — CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The driver of a taxicab which was on the right side of the street near the curb is not guilty of contributory negligence in suddenly turning to the left to avoid a head-on collision with an auto truck which was approaching on the wrong side of the street at a high rate of speed and cutting a corner, where there was no room to turn to the right and his passengers were in great peril. *Noyes v. Katsuno*.... 529
15. MUNICIPAL CORPORATIONS (389)—STREETS—AUTOMOBILES — NEGLIGENT USE—EVIDENCE—SUFFICIENCY. Whether the driver of an automobile could have seen a child in time to avoid striking him, is a question for the jury where there was evidence that he was driving slowly, the view across a parking strip was unobstructed, the child passing over a space of seventeen and one-half feet before entering the paved highway, which was twenty-five feet from curb to curb. *Bulger v. Yamaoka*..... 646
16. SAME (392)—INSTRUCTIONS. In an action for personal injuries to a child four years of age, struck by an automobile, an instruction as to the due care to be exercised if the driver saw the child approaching, need not include the restriction, "if he appreciated the danger of the situation," where it was apparent that the child was unaware of the automobile's approach. *Bulger v. Yamaoka*..... 646
17. SAME (392)—AUTOMOBILES—DEGREE OF CARE—DUTY OF DRIVER AT ALLEY INTERSECTIONS. In an action for personal injuries in striking a child emerging from an alley intersection in a residential section where children were playing on the street, it is not error to refuse instructions limiting the care to be exercised by automobile drivers to street intersections. *Bulger v. Yamaoka*..... 646
18. MUNICIPAL CORPORATIONS (525) — BONDS — SALE AT DISCOUNT. The sale of municipal bonds at a discount resulting in greater interest than allowed by law is an irregularity merely, and does not affect the power to make and issue the bonds. *Cuddy v. Sturtevant* 304
19. SAME (525)—BONDS—SALE AT DISCOUNT—RECITALS—ESTOPPEL—RIGHTS OF BONA FIDE PURCHASERS. Recitals in municipal bonds, payable to bearer out of a special fund, that every condition precedent to their issuance has been performed, work an estoppel in favor of bona fide purchasers in the open market, who are not required to consult the records to determine whether they were originally sold at a discount resulting in a greater rate of interest than allowed by law. *Cuddy v. Sturtevant*..... 304

Murder:

See HOMICIDE.

Mutuality:

Necessity for mutuality of obligation, see **CONTRACTS**, 1.

Navigable Waters:

1. **Navigable Waters (21) — Lands Under Waters — Abandoned Channel—Title to Beds—Avulsion—Before Admission of State.** Where a navigable river changed its course by avulsion over public lands, before the admission of the state into the Union, the bed of the new channel remained in the government and was held in trust for the future state; and the trust title in the old channel thereupon ceased and the new state upon entering into the Union acquired no title thereto. *George v. Pierce County*. 495
2. **SAME (21)—Abandoned Channel—Possessory Rights.** The possessory rights of persons upon an old river channel, abandoned before the admission of the state, the title to which was in the government, cannot be questioned by the state which never had any title to the land, and the state can pass none by virtue of river improvements enhancing its value. *George v. Pierce County*. 495

Necessity:

For condemnation for public use, see **EMINENT DOMAIN**, 3-8.

Private way of necessity for logging road, see **EMINENT DOMAIN**, 6-8, 10.

Negligence:

Liability of assignee for loss on sale of property, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 2.

Of bailee, see **BAILMENT**.

Measure of damages, see **DAMAGES**, 6.

Causing death, see **DEATH**.

Demised premises, see **LANDLORD AND TENANT**, 2.

Of employers, see **MASTER AND SERVANT**.

Act of employee constituting negligence as against third persons, see **MASTER AND SERVANT**.

Causing injuries to persons using streets, see **MUNICIPAL CORPORATIONS**, 11-17.

Amendment of complaint to conform to proof of, see **PLEADING**, 5.

In operation of street railroads, see **STREET RAILROADS**.

1. **NEGLIGENCE (3, 38)—FIRES—EVIDENCE—SUFFICIENCY.** A threshing machine agent whose primary duty was to see that a new machine worked properly is liable for loss of grain by fire communicated from the machine, where it appears that he assumed control of the operations and disregarded suggestions as to the danger from sparks carried towards the grain by a strong wind. *Cronk-hite v. Whalen*. 31

Negligence—Continued.

2. SAME (17)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER.

An owner of grain destroyed by fire from a new threshing machine is not guilty of contributory negligence, where the company's agent assumed control of the operations and persisted in finishing the job after the owner requested him to stop on account of the danger from sparks blowing towards the grain. *Cronkhite v. Whalen* 31

Negotiable Instruments:

See **BILLS AND NOTES.**

Newspapers:

Reading of newspapers by jurors as ground for new trial, see **CRIMINAL LAW, 7.**

New Trial:

Review of discretionary ruling on motion, see **APPEAL AND ERROR, 14.**
Remand by appellate court for new trial, see **APPEAL AND ERROR, 25.**
In criminal prosecutions, see **CRIMINAL LAW, 5, 7.**

Nonresidence:

Service of process on nonresident, see **PROCESS, 1, 2.**

Notes:

Promissory notes, see **BILLS AND NOTES.**

Notice:

Of lien claim, see **MECHANICS' LIENS, 1.**
To owner of delivery of material, see **MECHANICS' LIENS, 2.**
Record of deed intended as mortgage, see **MORTGAGES, 3.**
Failure of sheriff to sign affidavit of publication as affecting right to confirmation of foreclosure sale, see **MORTGAGES, 6.**

Objections:

Review as dependent on objections made on trial, see **CERTIORARI.**

Obligation of Contract:

Laws impairing, see **CONSTITUTIONAL LAW, 3.**

Officers:

Corporate officers, see **CORPORATIONS, 3, 6.**
Admissions by corporate officer as evidence, see **EVIDENCE, 2.**
School officers, change of boundaries of district, see **SCHOOLS AND SCHOOL DISTRICTS, 3.**
Increase of salary during term of state officers, see **STATES.**
Executive construction of statutes, see **STATUTES, 2.**

Opening:

Judgment, see **JUDGMENT, 1, 2.**

Opinion Evidence:

In civil actions, see EVIDENCE, 4, 5.

Opinions:

Fraudulent representations as matters of fact or of opinion, see FRAUD, 1, 2.

Oral Agreements:

As to court proceedings, see STIPULATIONS.

Oral Contracts:

See FRAUDS, STATUTE OF.

Oral Evidence:

To show intent of writings, see EVIDENCE, 3.

Orders:

Review of appealable orders, see APPEAL AND ERROR, 2.

Vacation, for fraud, of order setting aside real estate to widow, see EXECUTORS AND ADMINISTRATORS, 2.

Ordinances:

Construction of ordinance providing for public improvement, see MUNICIPAL CORPORATIONS, 3.

Regulating building of apartment houses, see MUNICIPAL CORPORATIONS, 9, 10.

Violation of ordinance giving pedestrians right of way at street crossings, see MUNICIPAL CORPORATIONS, 12.

Ownership:

Of property for purpose of taxation, see TAXATION, 1.

Parent and Child:

1. PARENT AND CHILD (4-1)—DUTY TO SUPPORT. The parent's duty to support a crippled child does not cease at the age of majority, but continues as long as the necessity exists. *Schultz v. Western Farm Tractor Co.*..... 351

Parol Evidence:

Of collateral agreement limiting liability of maker of note, see BILLS AND NOTES, 4.

To show construction placed upon writing by parties, see CONTRACTS, 3.

To show intent of writings, see EVIDENCE, 3.

Parties:

Entitled to allege error, see APPEAL AND ERROR, 9-11.

Engaged in service under Soldiers' and Sailors' Civil Relief act, see ARMY AND NAVY.

Parties—Continued.

- Construction of writing by parties, see **CONTRACTS**, 3.
- Rights and liabilities as to costs, see **COSTS**.
- Actions for benefit of estate, see **EXECUTORS AND ADMINISTRATORS**, 3.
- In actions relating to community property, see **HUSBAND AND WIFE**, 6.
- Joint interest, see **JOINT ADVENTURES**.
- Against whom process may be served, see **PROCESS**, 1.

Partnership:

- See **JOINT ADVENTURES**.
- Enforcement of contract to form partnership, see **SPECIFIC PERFORMANCE**, 2.
- 1. **PARTNERSHIP** (6, 87)—**EXECUTORY CONTRACTS—ACTION FOR ACCOUNTING**. An action for an accounting for partnership profits must fail where there was merely an agreement to form a partnership which was never consummated because of the fault of one party or the other. *Lucopoulos v. Sotriopoulos*..... 400

Part Performance:

- To satisfy statute of frauds, see **FRAUDS, STATUTE OF**, 4, 5.

Payment:

- Of account, see **ACCOUNT, ACTION ON**, 2.
- On note, see **BILLS AND NOTES**, 6.
- To contractor as breach of contract releasing surety, see **COUNTIES**, 1.
- Of debt by third person, see **GUARANTY**, 2, 3.
- Liability of city on failure of special improvement fund, see **MUNICIPAL CORPORATIONS**, 5-8.
- Over-payment by shipper for spur track, see **RAILROADS**.
- Tender of purchase price as condition precedent to rescission of contract, see **SALES**, 5.

Performance:

- Or breach of contract, see **CONTRACTS**, 4, 5.
- Affecting operation of statute of frauds, see **FRAUDS, STATUTE OF**, 3-5.
- Of contract, see **JOINT ADVENTURES**.

Perjury:

- As ground for vacation of judgment, see **JUDGMENT**, 1.

Personal Injuries:

- Measure of damages, see **DAMAGES**, 6.
- Accrual of husband's action against county for injuries to wife, see **DEATH**, 2.
- From defective condition of demised premises, see **LANDLORD AND TENANT**, 2.
- To employee or third person, see **MASTER AND SERVANT**.

Personal Injuries—Continued.

Collision with automobile, see MUNICIPAL CORPORATIONS, 11-17.

Amendment of complaint in action for, see PLEADING, 5.

To persons on or near street railroad tracks, see STREET RAILROADS.

Personal Property:

Wrongful conversion, see TROVER AND CONVERSION.

Personal Taxes:

See TAXATION.

Petition:

For change of boundaries of district, see SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

Place:

Necessity of charging place of offense, see INTOXICATING LIQUORS, 3.

Pleading:

Allowing amendment to change form of action, see ACTION, 1.

Pleading title or possession, see ADVERSE POSSESSION, 3.

Amendments regarded as made, see APPEAL AND ERROR, 12, 13.

Vacation of judgment, see JUDGMENT, 2.

1. PLEADING (27)—THEORY AND FORM—TITLE TO PLEADING. The title given to a pleading is immaterial, and if the facts set up in an affirmative defense entitled defendant to relief, it will be treated as a cross-complaint. *Schmelling v. Hoffman*..... 408
2. PLEADING (30)—COMPLAINT—DUPLICITY. A complaint in an action on an account stated is not duplicitous from the statement of facts not inconsistent, constituting a cause of action without reference to the account, upon which plaintiff may recover, although the account stated was not proven. *Hurley-Mason Co. v. Pacific Commissary Co.* 439
3. PLEADING (61-64)—COUNTERCLAIM—NECESSITY OF PLEADING. In an action for the value of cribs and ways, consisting of ties and plank-ing, converted by the defendant, in the absence of pleading and proof as to defendant's cost in dismantling the ways, defendant cannot claim an offset of such cost against the value of the material as shown by the price for which it was sold. *McVeety v. Hayes*.. 457
4. PLEADING (101)—AMENDMENT AT TRIAL—DISCRETION. It is not an abuse of discretion to refuse to permit a trial amendment after the evidence was in, where the issues had been made up for eight months and several continuances had been granted at appellants' request. *Osner & Mehlhorn, Incorporated, v. Loewe*..... 550
5. PLEADING (104)—AMENDMENT TO CONFORM TO PROOF. In an action for personal injuries sustained by a stevedore through the alleged

Pleading—Continued.

negligence of a stevedore company in directing the operation of an electric winch, it is proper to allow the complaint to be amended to conform to proof of negligence in continuing operations after knowledge of the incompetence of the employee operating the winch, brought out on cross-examination of plaintiff's witnesses; where no prejudice or surprise was shown. *Pearson v. Arlington Dock Co.* 14

6. PLEADING (112) — COMPLAINT — AMENDMENT — NEW OR DIFFERENT CAUSE OF ACTION. It is not an abuse of discretion to refuse to allow a trial amendment to the complaint where it introduced new issues and amounted to an abandonment of the stated cause and the commencement of an entirely new action. *Martin v. Bateman*..... 634
7. PLEADING (112) — AMENDMENT OF COMPLAINT — JURISDICTION — CHANGE IN FORM OF ACTION—DIVORCE. A complaint in an action for separate maintenance, where no service of process was had, may be amended on application of the plaintiff so as to state a cause of action for divorce. *Schwarzmilller v. Schwarzmilller*..... 672
8. PLEADING (119)—ANSWER—AMENDMENT—DISCRETION. It is not an abuse of discretion to allow an answer to be amended at the trial by withdrawing an admission where there was no showing that the plaintiff was misled. *John R. O'Reilly, Incorporated, v. Tillman* 594

Police Power:

Of municipality, see MUNICIPAL CORPORATIONS, 9, 10.

Policy:

Of insurance, see INSURANCE.

Possession:

See ADVERSE POSSESSION.

Of land as part performance to satisfy statute of frauds, see FRAUDS, STATUTE OF, 4.

Disturbance of by landlord, see LANDLORD AND TENANT, 1.

Rescission by buyer for failure to deliver possession, see SALES, 2

Powers:

Of court to permit change in form of action, see ACTION, 1.

Of state fair commission, see AGRICULTURE.

Judicial powers, see CONSTITUTIONAL LAW, 2.

Of state game warden, see GAME.

Of local agent, see INSURANCE, 8.

Of city to assume payment of deficiency in local improvement fund, see MUNICIPAL CORPORATIONS, 5-8.

Of city in regulation of buildings, see MUNICIPAL CORPORATIONS, 9, 10.

Of county superintendent to transfer portion of district to another, see SCHOOLS AND SCHOOL DISTRICTS, 3.

Of court, taking case from jury, see TRIAL, 2.

Practice:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; PLEADING; VENUE.
Prosecution of actions in general, see ACTION.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 21-24.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 5, 9, 10.
Change of venue for prejudice of judge, see VENUE.

Premises:

Defective premises, liability of landlord, see LANDLORD AND TENANT, 2.

Presentment:

Of claim against county, see COUNTIES, 3, 4.

Presumptions:

On appeal, see APPEAL AND ERROR, 12, 13.
Of negligence by bailee, see BAILMENT, 2, 4.
As to community nature of property, see HUSBAND AND WIFE, 3.
As to community character of debt contracted by either spouse, see HUSBAND AND WIFE, 5.
As to intent to deceive, in obtaining policy, see INSURANCE, 4.
From recitals in judgment, see JUDGMENT, 3.

Price:

Inadequate price as ground for refusing to confirm foreclosure sale, see MORTGAGES, 7.

Principal and Agent:

Agency of members of clearing house association, for checks cleared for non-member, see BANKS AND BANKING, 8-13
Insurance agents, see INSURANCE, 1, 2.
Knowledge of acts of agent as working estoppel, see INSURANCE, 5, 8.
Waiver of forfeiture provision in policy, see INSURANCE, 8.
Master's liability for wrongful acts or commissions of servant, see MASTER AND SERVANT.

1. PRINCIPAL AND AGENT (48)—AGENT'S LIABILITY—OWNER'S BREACH OF CONTRACT. Upon the owner's breach by the cancellation of a building contract, the general contractor who acted merely as agent of the owner in making the contract, is not liable. *Di Luck v. Bradner Company, Inc.* 291
2. PRINCIPAL AND AGENT (56, 56-1) — LIABILITIES OF AGENT — FRAUD. An agent is liable in tort for false representations of material facts inducing plaintiff to purchase lands of his principal if he knew the statements to be false, or if he made them as positive assertions calculated to convey the impression that he had actual knowledge of their truth, when in fact he had no such knowledge; and he cannot

Principal and Agent—Continued.

escape liability by claiming that the information was based solely on information furnished by the principal. *Lasman v. Calhoun, Denny & Ewing*..... 467

Principal and Surety:

Sureties on contractor's bond, see COUNTIES, 1.
Contracts of guaranty, see GUARANTY.

Probable Cause:

For prosecution, see MALICIOUS PROSECUTION.

Proceeds:

Of property of husband or wife, as affecting community character, see HUSBAND AND WIFE, 3.

Process:

- Commencement of actions, see ACTION.
- Special appearance to quash service of summons, see APPEARANCE.
- Depositions in opposition to motion to quash service of summons, see DEPOSITIONS.
- To sustain judgment, see JUDGMENT, 2, 3.
- 1. PROCESS (41)—PERSONS AGAINST WHOM PROCESS MAY BE SERVED—NON-RESIDENTS. A non-resident who is temporarily in the state for the purpose of defending a pending action is privileged from the service of process in a civil transitory action. *State ex rel. Gunn v. Superior Court* 187
- 2. PROCESS (25) — SERVICE BY PUBLICATION — AFFIDAVIT. Jurisdiction of a non-resident is not acquired by service of a summons by publication, where the affidavit for publication failed to state the existence of any of the grounds specified, as required by Rem. Code, § 228. *Burns v. Stolze*..... 392
- 3. PROCESS (42, 43)—EVIDENCE TO IMPEACH RETURN—FRAUD—SUFFICIENCY OF EVIDENCE. There is sufficient evidence of fraud in making an affidavit for publication of a summons under Rem. Code, § 228, stating that the defendant cannot be found (of which the sheriff's return is prima facie evidence), where it appears that the defendant was a resident of the city, engaged in business as a painting contractor, with his name in the official city directory and in the city telephone directory for years, and that plaintiffs had made payments to his agent who was also still residing in the city; and in such case the sheriff's return of "not found" is insufficient to justify the service, since there must be an effort in good faith to find him. *Schmelling v. Hoffman*..... 408

Profits:

Loss of profits as element of damages, see DAMAGES, 4, 8.

Promissory Notes:

See **BILLS AND NOTES**.

Property:

Taking for public use, see **EMINENT DOMAIN**.

Annexation of personal to real property, see **FIXTURES**.

Separate or community nature of, see **HUSBAND AND WIFE**.

Publication:

Of summons to sustain judgment, see **JUDGMENT**, 2, 3.

Service of process, see **PROCESS**, 2, 3.

Public Debt:

See **COUNTIES**, 2.

Public Improvements:

By counties, see **COUNTIES**, 1, 2.

By cities, see **MUNICIPAL CORPORATIONS**, 3-8.

Public Use:

· Taking property for public use, see **EMINENT DOMAIN**.

Punishment:

Failure of laws defining jointist to specify place of imprisonment, see
INTOXICATING LIQUORS, 4.

Quantum Meruit:

See **CONTRACTS**, 5; **WORK AND LABOR**.

Questions for Jury:

In action for injury to third person, see **MASTER AND SERVANT**, 5.

Contributory negligence of person struck by auto truck at crossing,
see **MUNICIPAL CORPORATIONS**, 13.

In action for damages from collision between street car and automobile, see **STREET RAILROADS**, 3, 4.

Quieting Title:

Pleading adverse possession by plaintiff, see **ADVERSE POSSESSION**, 3.

Railroads:

Damages for injury to real property, see **DAMAGES**, 7.

Railroads in city streets, see **STREET RAILROADS**.

1. **RAILROADS (13)—CONSTRUCTION OF SPUR TRACK—CONTRACTS—OVER PAYMENT.** Notwithstanding Rem. Code, § 8626-13, requiring railroads to provide shippers with spur tracks at cost, when reasonably practicable, necessary, and safe, an agreement by a railroad to construct temporary spur tracks for a mill company at a certain price to be paid in advance, is binding as the voluntary contract of the

Railroads—Continued.

mill company, which cannot recover the sums paid in excess of the cost, where it does not appear that the contract was not voluntary or the price agreed upon a fair bona fide estimate of the cost. *Skagit Mill Co. v. Great Northern Railway Co.*..... 378

Rate:

Of speed of street car, see STREET RAILROADS, 2.

Real Property:

Adverse possession, see ADVERSE POSSESSION.

Negligent sale of by assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 2.

Excessive damages for injury to, see DAMAGES, 7.

Evidence as to market value, see EVIDENCE, 1, 5.

Competency of witness to testify as to value of real property, see EVIDENCE, 5.

Sale on execution, see EXECUTION.

Fraud in sale or exchange of, see FRAUD, 2, 4, 6.

Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF.

Joint owners, see TENANCY IN COMMON.

Contracts for conveyance, see VENDOR AND PURCHASER.

Receivers:

Of corporations in general, see CORPORATIONS, 4, 5.

Appointment of as excuse for not filing lien claim, see MECHANICS' LIENS, 1.

1. RECEIVERS (40-1) — APPOINTMENT — EFFECT UPON LIENS. The appointment of a receiver does not affect the rights of parties to liens or prevent the filing of claims therefor. *Brown v. Hunt & Mottet Co.* 564

Recitals:

Presumptions from recitals in judgment, see JUDGMENT, 3.

In municipal bonds, see MUNICIPAL CORPORATIONS, 19.

Records:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 5, 6.

Of mortgages in general, see MORTGAGES, 3.

Redemption:

Oral agreement for redemption from mortgage as within statute of frauds, see FRAUDS, STATUTE OF, 1.

Refund:

Assignment of contract as affecting right to refund of purchase money on death of holder, see VENDOR AND PURCHASER, 2, 3.

Regulation:

Of ferries, see **FERRIES**.

Building regulations, see, **MUNICIPAL CORPORATIONS**, 9, 10.

Reliance:

On representations, see **FRAUD**, 3, 4.

Remand:

By appellate court for further proceedings, see **APPEAL AND ERROR**, 26.

Removal:

Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 1.

Removal of Causes:

Change of venue or place of trial, see **VENUE**.

Reopening Case:

For further evidence, see **TRIAL**, 1.

Repeal:

Implied repeal of statute, see **FERRIES**; **STATUTES**, 1.

Requests:

For instructions in criminal prosecutions, see **CRIMINAL LAW**, 4.

For instructions in civil actions, see **TRIAL**, 4.

Rescission:

Of contract for fraud, see **EXCHANGE OF PROPERTY**.

Of contract for sale of goods, see **SALES**, 2-5.

Res Gestae:

In criminal prosecutions, see **CRIMINAL LAW**, 2.

Res Judicata:

Bar by election of concurrent remedy, see **ELECTION OF REMEDIES**.

Resolutions:

Passed by vote of interested trustees, for compensation, see **CORPORATIONS**, 6.

Retrospective Laws:

See **INSURANCE**, 9.

Effect of laws reducing rate of interest on delinquent taxes, see **TAXATION**, 2, 3.

Return:

Of process in general, see **PROCESS**, 3.

Revenue:

See **TAXATION**.

Construction of laws as to collection of revenues, see **STATUTES**, 4.

Review:

- In civil actions, see APPEAL AND ERROR.
- Scope and extent, see CERTIORARI.
- In criminal prosecution, see CRIMINAL LAW, 1, 8-10.

Right of Way:

- At street crossings, see MUNICIPAL CORPORATIONS, 12.

Roads:

- Issuance of bonds for without vote of people, see COUNTIES, 2.
- Condemnation of land for state road, see EMINENT DOMAIN, 5, 9.
- Streets in cities, see MUNICIPAL CORPORATIONS, 11-17.

Rules:

- Of clearing house association, see BANKS AND BANKING, 7-10.
- Civil service rules, see MUNICIPAL CORPORATIONS, 1-2.

Safes:

- Walled-in safe as fixture, see FIXTURES, 3.

Salary:

- Increase on transfer of civil service employee to other similar position, see MUNICIPAL CORPORATIONS, 2.
- Increase of officers' salary during term, see STATES.

Sales:

- By assignees for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 2.
 - On execution, see EXECUTION.
 - Elevator installed under conditional sales contract as fixture, see FIXTURES, 1, 2.
 - Reliance on false representations inducing sale, see FRAUD, 3, 4.
 - Unlawful sale of intoxicating liquors, see INTOXICATING LIQUORS.
 - Foreclosure sales, see MORTGAGES, 6-8.
 - Of municipal bonds, see MUNICIPAL CORPORATIONS, 18, 19.
 - Of municipal bonds at discount, see USURY, 1.
 - Of real property, see VENDOR AND PURCHASER.
1. SALES (29)—SUBJECT MATTER—PERSONALTY "APPERTAINING" TO A SAW-MILL. A bill of sale of a sawmill, buildings, engines, equipment and all other articles now on said premises "appertaining to said sawmill and logging outfit," includes the planking and ties with which cribs and ways were constructed, connecting with a loading platform at a railroad siding where the products of the mill were loaded. *McVeety v. Hayes*..... 457
 2. SALES (54)—BREACH—RESCISSION BY BUYER—FAILURE TO DELIVER POSSESSION. Under a contract for the sale of the personal property and leasehold of a hotel, the contract to be performed within ten days and providing that time was the essence thereof, and that the title to the property should be made good within such time or the

Sales—Continued.

agreement to be void, failure of the defendant to deliver possession of the property through failure to acquire title thereto entitles the purchaser to rescind the contract and recover earnest money paid thereon. *Hunter v. Radford*..... 668

3. SALES (58)—WARRANTY—RESCISSION BY PURCHASER—WAIVER OF RIGHT. There is no waiver of the right to rescind for breach of warranty on the sale of a motor truck from the fact that the purchaser retained and used the truck for six or seven weeks after discovering the defects, where the delay in rescission was induced by repeated assurances of the vendor that it would be made to work properly, and efforts on the part of mechanics sent by the vendor to remedy the defects were without success. *Noel v. Garford Motor Truck Co.* 650
4. SAME (59) — BREACH OF WARRANTY — RESCISSION — PLACING IN STATU QUO. The purchaser of a motor truck may rescind the sale for breach of warranty, although the truck suffered damage through a collision while in his possession, the evidence showing that the truck was in substantially the same condition after its repair as prior to the accident and that the collision was caused by a stalling of the truck due to a defective motor, and that the driver was free from negligence. *Noel v. Garford Motor Truck Co.*..... 650
5. SAME (59)—RESCISSION BY BUYER—CONDITIONS PRECEDENT—TENDER OF PURCHASE PRICE. Conceding that the delivery of possession and tender of payment were concurrent acts, under a contract for the purchase of a lease and hotel equipment, the purchaser may rescind and recover earnest money paid, without first tendering payment and demanding possession, it being known that he had the money in his possession and was able and willing to perform, but that defendant was unable to deliver because unable to acquire the right of possession within the time limited. *Hunter v. Radford* 668
6. SALES (79)—ACCEPTANCE—DELAY IN REJECTING GOODS. Where the sale of canvas by sample was made on thirty days' credit, it was the buyer's duty to inspect the same within such period, and asking an extension of time and delay in inspection from November 8 until January 23 implies an acceptance. *Carman Distributing Co. v. Cascade Laundry Co.*..... 487

Sanitarium:

As charitable institution. see CHARITIES.

Schools and School Districts:

1. SCHOOLS AND SCHOOL DISTRICTS (1-1)—DISTRICTS—BOUNDARIES—INCORPORATION OF TOWN. The incorporation of a town of the fourth class does not necessarily create a new school district out of the district of which it was formerly a part, under Laws of 1889-90,

Schools and School Districts—Continued.

- p. 379, § 64, which provides that each incorporated city or town shall comprise one district, with the provision that city or town districts may be extended a reasonable distance outside the city. *In re Tukwila School District*..... 329
2. SAME (1-1). The school code, Rem. Code, § 4422, providing that all school districts "now existing are hereby recognized as legally organized" districts, fixes the status of a district then shown by the records and precludes a claim by a town that it was a district separate and apart therefrom. *In re Tukwila School District* 329
3. SCHOOLS AND SCHOOL DISTRICTS (7-1, 8)—CHANGE OF BOUNDARIES—PETITION—"HEADS OF FAMILIES"—POWERS OF OFFICERS. Under Rem. Code, § 4433, the county superintendent cannot transfer portions of one school district to another where it is made to appear at the hearing that the petition for the change was not signed by a majority of the heads of families residing in the territory transferred. *State ex rel. Bouffleur v. Superior Court*..... 477
4. SAME (7-1, 8). Rem. Code, § 4433, requiring a majority of the heads of families to sign a petition for transferring territory from one district to another, means all heads of families, regardless of whether they have children of school age or not. *State ex rel. Bouffleur v. Superior Court*..... 477

Season:

Creation of open season by state game warden, see GAME.

Self-Serving Declarations:

See CRIMINAL LAW, 3.

Separate Estate:

Of married women, see HUSBAND AND WIFE, 2-4.

Separate Maintenance:

Amendment of complaint to state cause of action for divorce, see PLEADING, 7

Servants:

See MASTER AND SERVANT.

Service:

Of process, see ACTION; PROCESS.

Services:

Implied contract to pay for services, see WORK AND LABOR.

Set-off and Counterclaim:

Pleading matter of set-off or counterclaim, see PLEADING, 3.

Set-off and Counterclaim—Continued.

1. SET-OFF AND COUNTERCLAIM (12)—SUBJECT MATTER—CAUSES OF ACTION ON OTHER AND DISTINCT TRANSACTION. In a client's action against an attorney to recover money collected and wrongfully withheld, a counterclaim for libel in making complaint against the attorney to the grievance committee of the bar association does not arise out of the transactions set forth in the complaint, within the requirement of Rem. Code, § 265. *Henrickson v. Smith*..... 82

Shipping:

Liability for negligence of loaned servant, see MASTER AND SERVANT, 1, 3.

Signatures:

Failure of sheriff to sign affidavit of publication of notice of sale, see MORTGAGES, 6.

To petition for transfer of territory to other district, see SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

Special Appearance:

See APPEARANCE.

Special Deposits:

See BANKS AND BANKING, 1.

Special Fund:

To pay for improvement, effect of deficiency in, see MUNICIPAL CORPORATIONS, 4-8

Special Laws:

See STATUTES, 1, 4, 5.

Specific Performance:

1. SPECIFIC PERFORMANCE (6) — DEFENSES — TITLE OF DEFENDANT. Where, at the time of commencing suit for specific performance, the title had been conveyed and plaintiff knew that the court was without jurisdiction to decree specific performance, it is error to grant alternative judgment for damages. *Martin v. Bateman*..... 634
2. SPECIFIC PERFORMANCE (11-25) — CONTRACTS ENFORCEABLE—To FORM PARTNERSHIP. Specific performance of a contract to form a partnership will not be decreed, except under special circumstances. *Lucopoulos v. Sutriopoulos*..... 400

Speed:

Evidence as to rate of speed of street car, see STREET RAILROADS, 2.

Spur Track:

Construction of by railroad for shipper, see RAILROADS.

State Demands:

See **EQUERRY.**

State Fair Commission:

Collection and custody of funds, see **AGRICULTURE.**

Statement:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 5, 6.

States:

Collection and custody of funds by state fair commissioners, see **AGRICULTURE.**

Delegation of legislative power, see **CONSTITUTIONAL LAW**, 1.

Laws impairing obligation of contracts, see **CONSTITUTIONAL LAW**, 3.

Condemnation of lands for highway, see **EMINENT DOMAIN**, 5, 9.

Title to abandoned river channel, see **NAVIGABLE WATERS.**

Construction of laws relating to collection of revenues, see **STATUTES**, 4.

1. **STATES (11)—OFFICERS (43)—SALARY—INCREASE DURING TERM—ADDITIONAL DUTIES—STATUTES.** The state labor commissioner having previously been vested with extensive powers and duties with reference to enforcing laws enacted for the safety of workmen, which were of the same general nature as those imposed upon him by chapter 130, Laws of 1919, p. 309, his salary could not be increased during his term of office, in violation of Const., Art. 2, § 25, on account of the additional duties imposed upon him by that act, as such duties were merely incidental, collateral or germane to his prior duties. *State ex rel. Younger v. Clausen*..... 241
2. **STATES (11)—OFFICERS (43)—SALARY—INCREASE DURING TERM—ADDITIONAL DUTIES—STATUTES.** The duties of the state mining inspector under the coal mining code, Laws of 1917, p. 109, being practically the same as under chapter 130, Laws of 1919, p. 309, the legislature could not by the later act, increase his salary during his term of office by reason of the addition of new duties which were only incidental, collateral or germane to his prior duties; and the additional duty of certifying certain facts from the records of his office is germane and incidental only. *State ex rel. Bagley v. Clausen* 254

Statu Quo:

Placing parties in *statu quo*, on rescission for breach of warranty, see **SALES**, 4.

Statutes:

See **ASSIGNMENTS**, 3; **FRAUDS**, **STATUTE OF.**

Relating to powers of state fair commissioner, see **AGRICULTURE.**

Laws impairing obligation of contracts, see **CONSTITUTIONAL LAW**, 3.

Statutes—Continued.

- Filing claims against county, retroactive effect, see **COUNTIES**, 3, 4.
- Regulating taking of depositions, see **DEPOSITIONS**.
- Condemnation of property for irrigation purposes, see **EMINENT DOMAIN**, 1, 4.
- Proceedings to take property for state road, see **EMINENT DOMAIN**, 9.
- Implied repeal of law regulating ferries, see **FERRIES**.
- Construction of laws granting state game warden power to "open, close or shorten" season, see **GAME**.
- Defining agent or broker, see **INSURANCE**, 2.
- Limiting payment of fraternal benefits, see **INSURANCE**, 9.
- Defining "jointist," and making it a felony, see **INTOXICATING LIQUORS**, 1, 4.
- Statutes of limitation, see **LIMITATION OF ACTIONS**.
- Prohibiting marriage, see **MARRIAGE**.
- Recording deeds and mortgages, see **MORTGAGES**, 3.
- City ordinances, see **MUNICIPAL CORPORATIONS**, 3.
- Increasing salary of officers during term, by imposing additional duties, see **STATES**.
- Retroactive effect of laws reducing rate of interest on delinquent taxes, see **TAXATION**, 2, 3.

1. **STATUTES (45)—REPEAL OF SPECIAL BY GENERAL ACT.** A special act is not repealed by a general act, contrary to the obvious legislative intent. *State ex rel. Sherman v. Benson*..... 124
2. **STATUTES (67)—EXECUTIVE CONSTRUCTION.** The courts are not bound by the construction of statutes by the administrative officers, even though approved by the law officers for a number of years. *State ex rel. Sherman v. Benson*..... 124
3. **SAME (68)—LEGISLATIVE CONSTRUCTION.** The courts should give heed to legislative construction of prior acts. *State ex rel. Sherman v. Benson* 124
4. **SAME (69)—CONSTRUCTION WITH REFERENCE TO OTHER STATUTES.** General enactments do not apply in the interpretation of special statutes, and the functioning of state institutions under special acts is not generally affected by general restrictive laws governing the collection of revenues. *State ex rel. Sherman v. Benson*..... 124
5. **STATUTES (69)—GENERAL OR SPECIAL ACTS—FERRIES.** The ferry law, Rem. Code, §§ 4998 to 5013-1, was a special law on that subject alone and not a general law. *State ex rel. Allen v. Public Service Commission* 294

Stipulations:

1. **STIPULATIONS (2)—CONSTRUCTION—ADMISSION OF EVIDENCE.** A stipulation that the conversations leading up to a fishing contract about the use and purpose of a "stand-by boat" to be furnished may

Stipulations—Continued.

be admitted without objection, does not preclude a party to it from offering further evidence as to the meaning of the terms "stand-by."
Florence Fish Co. v. Everett Packing Co...... 1

Stockholders:

Of corporations, see CORPORATIONS, 1, 2, 4, 5.

Street Railroads:

1. STREET RAILROADS (25)—NEGLIGENCE OF MOTORMAN—EVIDENCE—ADMISSIBILITY. In an action for injuries from a collision between a street car and an automobile, although the negligence primarily relied on was the obstruction of the right side of the street, it was proper to admit testimony that the motorman could have stopped his car before hitting the automobile, since defendant's negligence is to be determined by all the circumstances of the case, including the manner in which the car was being operated. *Coons v. Olympia Light & Power Co.*..... 677
2. SAME (27)—RATE OF SPEED—EVIDENCE—ADMISSIBILITY. In an action for injuries from a collision between a street car and an automobile, where the complaint alleged that the speed of the oncoming car contributed to the injury, but did not allege that such speed was excessive, the admission of evidence that it was "coming pretty fast" is not error, since the plaintiff had a right to show the car's actual speed, from which the jury might determine whether defendant was negligent in that regard in approaching an obstructed street intersection. *Coons v. Olympia Light & Power Co.*..... 677
3. STREET RAILWAYS (29)—OPERATION—ACTIONS FOR INJURIES—COLLISION—NEGLIGENCE—QUESTION FOR JURY. In an action for damages from a collision between a street car and an automobile, the negligence of the company is for the jury, where it had obstructed the right-hand side of the street by a street car, waiting upon a switch to meet another car, requiring the driver of the automobile to pass around and over the main tracks, and a street car, approaching on a dark, rainy night, failed to sound any warning of its approach. *Coons v. Olympia Light & Power Co.*..... 677
4. SAME (30)—OPERATION—ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE. In such a case, the contributory negligence of the driver of the automobile is a question for the jury, where there was evidence that his vision was obscured by rain on the windshield and by the lights of many automobiles and the fully lighted street car on the spur track, and that he looked around the windshield and saw no car approaching, and turned out to pass around the standing car and was struck by the oncoming car which he failed to see. *Coons v. Olympia Light & Power Co.*..... 677

Streets:

See MUNICIPAL CORPORATIONS, 11-17.

Summons:

See PROCESS.

Commencement of action, see ACTION.

Special appearance to quash service of, see APPEARANCE.

Service of to sustain judgment, see JUDGMENT. 2, 3.

Supersedeas:

On appeal or writ of error, see APPEAL AND ERROR, 4.

Support:

Of crippled child by parent, see PARENT AND CHILD.

Surplusage:

In verdict, see TRIAL, 5.

Taxation:

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 3-8.

1. TAXATION (18) — ASSESSMENT — OWNERSHIP OF PROPERTY — CONTRACT — CONSTRUCTION. Materials assembled by and under the control of a shipbuilding company, listing the same as the owner, must be considered as its property for the purpose of taxation, notwithstanding a contract between it and the Emergency Fleet Corporation, which provided that the latter should, as between the parties, be considered the owner of materials ordered or assembled in the yard, "to the extent of the payments made thereon," in the absence of evidence of payments on the particular material assembled; and the Fleet Corporation is not shown to be the owner by evidence that the shipbuilding company had earned but \$2,170,700 on its contract and that the Fleet Corporation had advanced \$3,144,700 thereon, under a contract calling for only partial payments as the work progressed. *Sloan Shipyard Corporation v. Thurston County* 361
2. TAXATION (173) — CONSTITUTIONAL LAW (65, 77) — INTEREST ON DELINQUENT TAXES — CHANGE OF LAW. Laws 1917, p. 582, amending Rem. Code, §§ 9219, 9252, 9253, 9259 and 9262, and reducing the rate of interest on delinquent taxes from fifteen to twelve per cent, which took effect June 8, 1917, operates upon certificates issued prior to the taking effect of the act, since the rights of the certificate holder are not contractual and no vested rights are affected. *Security Savings Society v. Spokane County* 35
3. SAME (173) — STATUTES (85) — RETROACTIVE EFFECT — CHANGE IN INTEREST CHARGE. While Laws 1917, p. 582, reducing the rate of interest on delinquent taxes, operates upon certificates issued prior

Taxation—Continued.

to the taking effect of the act. it is wholly prospective from and after the date of its taking effect. *Security Savings Society v. Spokane County* 35

Tenancy in Common:

Condemnation of irrigation ditch by joint owner, see EMINENT DOMAIN, 1-4.

1. TENANTS IN COMMON (1)—TRUSTS (11)—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY. Findings that parties, contemplating matrimony, pooled their interests and became tenants in common or joint owners of property are not sustained, where it appears that the properties were contracted and partly paid for by the woman before any acquaintance with her future husband, who was without any means or business, that she gave him a power of attorney and he transacted her business for her, making some payments by checks signed as trustee, and on final payment took deeds to the property in his own name without her consent or knowledge. *Slasor v. Slasor* 90

Tender:

Recitals in judgment as curing error in failure to tender deed, see APPEAL AND ERROR, 24.

Of purchase price as condition precedent to rescission of contract, see SALES, 5.

Testamentary Capacity:

See WILLS, 1.

Time:

For transmission and filing of record on appeal, see APPEAL AND ERROR, 5, 6.

Extension of time for filing transcript and briefs, see APPEAL AND ERROR, 6.

For taking depositions, see DEPOSITIONS.

Effect of lapse of time on right to equitable relief, see EQUITY.

Title:

To proceeds of draft deposited for collection, see BANKS AND BANKING, 2, 4-6.

Of purchaser at execution sale, see EXECUTION.

Beds of navigable waters, see NAVIGABLE WATERS.

To pleading, see PLEADING, 1.

Of defendant as defense to action, see SPECIFIC PERFORMANCE, 1.

Interest in property subject to taxation, see TAXATION, 1.

Of deviser, see WILLS, 4.

Torts:

- See MALICIOUS PROSECUTION.
- Of bailee, see BAILMENT.
- Measure of damages, see DAMAGES, 6.
- Causing death, see DEATH.
- Fraud in sale of property, see FRAUD.
- Liability of community property for torts of spouses, see HUSBAND AND WIFE, 5.
- Injuries from defective or dangerous condition of demised premises, see LANDLORD AND TENANT, 2.
- Injuries to third persons by employees, see MASTER AND SERVANT.
- Agents, see PRINCIPAL AND AGENT.
- Setting off damages for torts, see SET-OFF AND COUNTERCLAIM.
- Injuries caused by operation of street cars, see STREET RAILROADS.
- Conversion of personal property, see TROVER AND CONVERSION.

Towns:

- As comprising school district, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

Transcripts:

- Of record for purpose of review, see APPEAL AND ERROR, 5, 6.

Transfer:

- Of civil service employees to other similar position, see MUNICIPAL CORPORATIONS, 1-2.

Trial:

- Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 3.
 - Review of matters not before trial court, see APPEAL AND ERROR, 8.
 - Review of discretionary action, see APPEAL AND ERROR, 14.
 - Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 21-24.
 - Review of errors as dependent on objection in lower court, see CERTIORARI.
 - In criminal prosecutions, see CRIMINAL LAW.
 - Instructions in action for fraud in trade of lands, see FRAUD, 6.
 - Instructions in action on insurance policies, see INSURANCE, 5, 7.
 - Instructions in action for injury to third person, see MASTER AND SERVANT, 6.
 - Instructions as to care required of driver of auto, see MUNICIPAL CORPORATIONS, 16, 17.
 - Amendment of pleadings at trial, see PLEADING, 4-8.
 - Place of trial, see VENUE.
 - Competency and examination of witnesses, see WITNESSES.
1. TRIAL (32)—RECEPTION OF EVIDENCE—REOPENING CASE—DISCRETION. The reopening of a case for further evidence being largely

Trial—Continued.

- discretionary, error cannot be predicated upon the refusal to reopen a case generally for defendant's new testimony which was not rebuttal of new testimony offered by plaintiff, after reopening the case for a limited purpose for plaintiff's rebuttal and surrebuttal thereon by defendant. *Clark Lloyd Lumber Co. v. Puget Sound & C. R. Co.*..... 232
2. TRIAL (63)—TAKING CASE FROM JURY—POWER OF COURT. A verdict cannot be directed because the evidence is overwhelming on one side, if there was a substantial dispute in the evidence on a material issue, the limit of power being to grant a new trial. *Henrickson v. Smith*..... 82
3. TRIAL (83)—INSTRUCTIONS—FORM AND LANGUAGE. In an action for damages to a mill site and boom location by the construction of a railroad, an instruction as to the measure of damages in case waste material placed in the river could be removed, so as to make it a "safe and secure place," is not error, although whether it could have been removed so as to restore it to its former condition was a question for the jury, the defect, if any, being more in words than substance. *Clark Lloyd Lumber Co. v. Puget Sound & C. R. Co.* 232
4. TRIAL (103)—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions in the language proposed, if the substance was given by the court in its own language. *Jones v. Elliott*... 138
5. TRIAL (126) — VERDICT — FORM — SEGREGATION OF DAMAGES — SURPLUSAGE. In an action against joint tort feorsors, a verdict against both defendants in the sum of \$3,750 "each," must be taken as a verdict for the sum of \$7,500; and the jury having no right to segregate the damages, that portion of the verdict must be taken as surplusage. *Pearson v. Arlington Dock Co.*..... 14
6. TRIAL (151) — FINDINGS OF FACT—NECESSITY. In a law action, under Rem. Code, § 367, it is mandatory that findings of fact and conclusions of law must be made upon request. *Shelton v. Powers* 302

Trover and Conversion:

1. TROVER AND CONVERSION (36) — DAMAGES — AMOUNT FOR WHICH PROPERTY WAS SOLD. In an action for the conversion of lumber and materials, the value is sufficiently shown by the price for which the defendant sold it, and which was paid into court. *McVeety v. Hayes* 457

Trustees:

Vote for compensation by interested trustees, see CORPORATIONS, 6.

Trust Funds:

Of insolvent bank, see BANKS AND BANKING, 1, 10-12.

Trusts:

In real estate, see TENANCY IN COMMON.

Ultra Vires:

Contract and rules of clearing house association, see BANKS AND BANKING, 13.

Undue Influence:

Procuring making of will, see WILLS, 2.

United States:

Prosecution of action by person engaged in service under Soldiers' and Sailors' Civil Relief act, see ARMY AND NAVY.

Usury:

1. USURY (3)—MUNICIPAL BONDS—STATUTES. Municipal bonds sold at a discount which would result in greater interest than six per cent, in violation of Rem. Code, § 8008, are not therefore usurious; since the usury statute, Id., §§ 6250-6256, permits eight per cent interest on such bonds, and fixes penalties only in case of interest exceeding that "hereinbefore" provided for. *Cuddy v. Sturtevant* 304
2. USURY (13) — EQUITY (39) — RELIEF — CONDITION PRECEDENT. A party seeking equitable relief from an usurious contract must at least offer to return what he has received. *Cuddy v. Sturtevant* 304

Vacancy:

Filling vacant position under civil service rules, see MUNICIPAL CORPORATIONS, 1, 2.

Vacation:

Remedies for vacation of default judgment, see ELECTION OF REMEDIES.

Sale on execution, see EXECUTION, 1.

Of order setting aside real estate to widow, for fraud, see EXECUTORS AND ADMINISTRATORS, 2.

Value:

Evidence of reasonable value of expenses incurred, see DAMAGES, 1.

Competency of testimony showing value, see EVIDENCE, 1.

Opinion evidence as to value of property, see EVIDENCE, 4, 5.

Of property converted as affecting damages for conversion, see TROVER AND CONVERSION.

Vendor and Purchaser:

Rescission of contract for exchange of property, see EXCHANGE OF PROPERTY.

Purchasers at sale on execution, see EXECUTION.

Fixtures as between vendor and purchaser, see FIXTURES, 3.

Vendor and Purchaser—Continued.

False representations in sale of land, see FRAUD, 2, 4, 6.

Transfer of mortgaged property, see MORTGAGES, 4, 5.

Fraud of agent in inducing contract of sale, see PRINCIPAL AND AGENT, 2.

Transfers of ownership of personal property, see SALES.

1. VENDOR AND PURCHASER (30)—CONTRACTS—CONSTRUCTION. Where a contract for the purchase of land on the installment plan is capable of more than one construction, that one will be adopted which is most favorable to the purchaser. *McLaren v. Narrows Land Co.* 402
2. SAME (214) — ASSIGNEES OF CONTRACT — CONSTRUCTION — RIGHT TO REFUND. An assignment of a contract for the purchase of land with the written consent of the grantor, pursuant to terms of the agreement therefor, carries the whole contract, including the right to a return of the purchase money on death of the holder, notwithstanding the provision for refund was in the event of death while the contract "is in force and unassigned," where the contract did not make clear that the refund provision was to be unassignable. *McLaren v. Narrows Land Co.*..... 402
3. SAME (214). In such case, the right of the legal representatives of the deceased assignee to the refund is not defeated by the fact that the refund was conditioned on the payment of all installments promptly on or before the date thereof, where the contract provided sixty days' grace for the payments, and all payments were made and accepted without objection within the sixty-day period. *McLaren v. Narrows Land Co.*..... 402

Venue:

1. VENUE (18) — CHANGE — PREJUDICE OF JUDGE — RIGHT TO SECOND CHANGE—STATUTES—CONSTRUCTION. An accused having once demanded a change of venue or of judges on account of prejudice of the judge, is not entitled to seek another for prejudice of the new judge called in, under Rem. Code, § 209-2, which provides that no party or attorney shall be permitted to make more than one application. *State ex rel. Sheehan v. Reynolds*..... 281

Verdict:

Acceptance of reduced verdict as estoppel to allege error, see APPEAL AND ERROR, 9.

Review on appeal or writ of error, see APPEAL AND ERROR, 15.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 23.

In criminal prosecutions, see CRIMINAL LAW, 8.

Inadequate or excessive damages, see DAMAGES, 6.

Directing verdict in civil actions, see TRIAL, 2.

In civil actions, see TRIAL, 2, 5.

Waiver:

- Of error on appeal, see **APPEAL AND ERROR**, 9, 10.
- Bar of statute of frauds, see **FRAUDS, STATUTE OF**, 5.
- Of rights by guarantor, see **GUARANTY**, 1.
- Right to avoid, see **INSURANCE**, 8.
- Of right to rescind for breach of warranty, see **SALES**, 3.

War:

Prosecution of action by person engaged in service under Soldiers' and Sailors' Civil Relief act, see **ARMY AND NAVY**.

1. **WAR—ALIEN ENEMIES—TOLLING STATUTES OF LIMITATIONS—VOID MARRIAGE TO ALIEN.** The contraction of a bigamous marriage with an alien enemy, void because of another wife living, does not entitle the woman to the benefit of the Trading with the Enemy Act, October 6, 1917 (U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j), and Rem. Code, § 171, excluding the duration of the war from the period limited for the commencement of actions. *Beyerle v. Bartsch* 287

Warranty:

On sale of goods, see **SALES**, 3, 4.

Waters and Water Courses:

- Condemnation of ditch by cotenant as violating obligation of contract, see **CONSTITUTIONAL LAW**, 3.
- Condemnation of irrigation ditch by joint owner, see **EMINENT DOMAIN**, 1-4.
- Title to bed of abandoned river channel, see **NAVIGABLE WATERS**.

Ways:

Private ways of necessity, see **EMINENT DOMAIN**, 6-8, 10.

Wills:

Charitable bequests and devises, see **CHARITIES**.

1. **WILLS (5, 7)—TESTAMENTARY CAPACITY—INSANITY—EVIDENCE—SUFFICIENCY.** Mental capacity to execute a will is sufficiently shown notwithstanding physicians examined the testatrix about a year previously and testified that she was then an incompetent, suffering from senile dementia, a progressive and incurable disease, where she lived for nearly three years thereafter, her condition became much improved, she died from another disease, and witnesses testified that she comprehended the transaction. *White v. White*.. 354
2. **SAME (20)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.** Undue influence to make a will in favor of one who had acted as guardian for testatrix while she was incompetent is not established by the mere fact of the fiduciary and confidential relations existing between

Wills—Continued.

her, the guardian, and the attorney who drew the will. *White v. White* 354

3. **WILLS (64) — CONSTRUCTION — MISNOMER — EVIDENCE TO EXPLAIN AMBIGUITY.** A will bequeathing \$5,000 to each of the following named charitable institutions, naming with two other children's charities, "Tuberculosis Sanitarium, all located in Seattle or King County," there being none officially known by that name, presents such an ambiguity or misnomer as to admit of extrinsic evidence that the city of Seattle operated a free tuberculosis hospital north of the city, some miles from testator's home, popularly known by several designations, one of which was "Tuberculosis Sanitarium," which was the only strictly charitable institution of its kind in King county, and that, at the time the will was executed there was an extensive publicity campaign for the purpose of securing donations for a children's building at such institution; and such evidence warrants the finding that the city institution was intended by the will. *In re Wilson's Estate*..... 491
4. **WILLS (79)—RIGHTS OF DEVISEES—TITLE OF DEVISOR.** Where the testator was the holder of the bare legal title under a deed from one holding in trust, the property does not pass by his will, as the devisees take no greater interest than the devisor had to devise. *Slasor v. Slasor*..... 90

Witnesses:

See DEPOSITIONS.

Opinions of experts, see EVIDENCE, 4, 5.

1. **WITNESSES (46) — COMPETENCY — ADMISSIONS OF PERSONS SUBSEQUENTLY DECEASED.** A ledger account kept by a person since deceased, the entries therein being proven to be original, is admissible upon a dispute as to the amount of payments made upon a promissory note held by the deceased, where his executor testified that prior to filing his inventory, the account was shown to the debtor, also since deceased, and he admitted the same to be correct; the weight of the executor's evidence, however, being governed by the rule relating to conversations with a deceased person. *Burnham v. Rowley* 656
2. **WITNESSES (74)—CROSS-EXAMINATION—SCOPE AND EXTENT.** In an action for personal injuries sustained by a pedestrian at a street intersection through collision with an auto truck, an objection to a question asked plaintiff's companion on cross-examination as to the subject of their conversation, is properly sustained, though it might have been proper cross-examination had the purpose been to find out whether they were talking at the time. *Olsen v. Peerless Laundry* 660

Witnesses—Continued.

3. **WITNESSES (88) — EXAMINATION — REDIRECT EXAMINATION—SCOPE AND EXTENT.** Where, in a prosecution for homicide, defendant's cross-examination of a witness developed that witness had written a name on a slip of paper, which was sealed up and to be opened only in case witness disappeared, accused cannot complain that redirect examination disclosed the name of defendant as the person accused by the witness. *State v. Gottstein*..... 600

Work and Labor:

Liens for work and materials, see **MECHANICS' LIENS**.

1. **WORK AND LABOR (14) — PART PERFORMANCE — COMPLETION PREVENTED BY DEFENDANT.** On *quantum meruit* for the value of services of an architect in drawing plans for a building, the owner, after stopping the work before the plans were completed, cannot be heard to say that the plans when completed would have violated the building ordinances of the city; since such fact was rendered uncertain by defendant's acts. *Bebb v. Jordan*..... 73

Writings:

Assignments in writing, requisites, see **ASSIGNMENTS**, 3.

Parol evidence to vary writings, see **CONTRACTS**, 3.

Parol evidence to explain technical terms, see **EVIDENCE**, 3.

Writs:

See **CERTIORARI**; **MANDAMUS**; **PROCESS**.

23/21







